This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

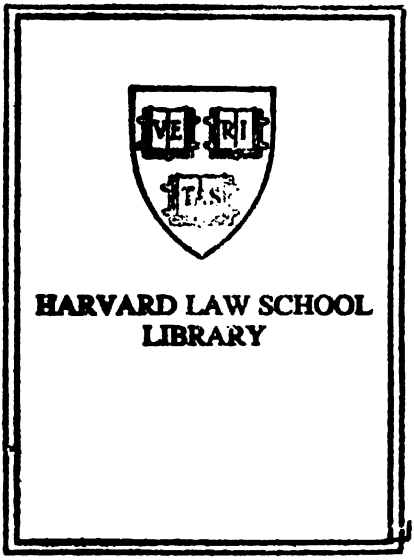
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`



Digitized by Google

Digitized by Google

Digitized by Google

14 24
18 344
20 537
25 155
34 673
48 89
52 260
52 637
52 638

14 41
23 321

14 44
16 794
20 129
37 114
69 865

14 51
58 730

14 61
20 298
57 227
58 410
66 617

14 70
17 335
18 274
26 337
26 542
50 725
64 613
66 641

14 83
15 218
23 99
42 312

14 89
20 557
20 558
24 244

14 93
15 694
37 240
37 242
37 244
37 268
37 269
37 273
45 5

14 100
27 795
40 797

14 111
17 392
20 122
67 547

14 128
16 639
20 341
20 575
40 347

14 139
17 456
18 191
18 368
23 178
29 53
50 158

14 161
27 457

14 179
50 728
51 598
59 172

14 199
22 169
45 396

14 209
16 232

14 212
20 661
51 65

14 218
14 39
31 62

14 239
19 313
32 312

14 255
21 237

14 259
24 168
26 209
42 219
44 403
35 338

14 286
16 440
19 625
26 574
42 87
44 511
44 512
46 94
50 545
51 232
52 421
66 484

14 294
20 89
41 78
45 329
47 78
47 226
47 365
48 551

14 305
18 507

14 323
22 97
22 194
43 346
67 450

14 326
16 399

14 335
22 10

14 345
19 129
20 481
21 582
37 554
51 152
57 547

14 351
21 689

14 358
45 132
51 442

14 367
20 130
20 133
21 301

14 375
54 311
55 222
59 677

14 384
20 649
22 210

14 393
15 90
18 446
19 169
21 693
31 612
47 118

14 404
21 40

14 412
16 443
44 440
46 257

14 417
20 658

14 433
20 621
24 559
25 155
31 667

14 440
21 145
26 542
36 149
41 48
49 434
56 229

14 451
44 201

14 464
21 240

14 475
46 639

14 485
41 562
46 41
56 616
58 524
58 528

14 502
18 163

14 507
20 129
24 464

14 513
16 49
16 62
16 63
16 65
16 67
16 69
16 71
16 173
17 429
18 507
20 524
21 160
21 518
21 520
24 198
24 324
24 328
24 333
24 334
40 35
41 131

14 599
15 177
20 530
21 579
51 605
51 622

14 628
2m1543
15 178
16 60
16 72
23 74
41 745
49 7

14 634
24 391

14 641
14 50
15 448
17 463
37 114

Copyright, 1893, by Frank Shepard, Chicago. (Patent applied for.)

Digitized by Google

Digitized by Google

Digitized by Google

Entered according to Act of Congress in the year 1846,
By W. C. Smedes and T. A. Marshall,
In the Clerk's Office of the District Court of the District of Massachusetts.

BOSTON:
PRINTED BY FREEMAN AND BOLLES,
DEVONSHIRE STREET.

Digitized by Google

JUDGES

OF THE

HIGH COURT OF ERRORS AND APPEALS,

DURING THE TIME OF THESE REPORTS.

HON. WILLIAM L. SHARKEY, CHIEF JUSTICE.

HON. ALEXANDER M. CLAYTON,
HON. J. S. B. THACHER,
HON. JAMES F. TROTTER,
(RESIGNED IN MAY, 1842.)
HON. EDWARD TURNER,
(TERM OF OFFICE EXPIRED NOVEMBER, 1843.)
} JUSTICES.

Digitized by Google

Digitized by Google

ADVERTISEMENT.

THE legislature, at its last session, passed an act, entitled "An act in relation to the Reporter of the High Court of Errors and Appeals;" of which the following is the first section, viz.: "That hereafter the briefs to be published in the reports of the decisions of the High Court of Errors and Appeals, shall contain only a concise statement of the points submitted, and a like reference to the authorities cited, on both sides."

From this section of the law the members of the bar who practise in that court will perceive the necessity of making their briefs in accordance with its provisions. Otherwise *they will not be published.*

In the present volume, the reporters have bestowed a great deal of labor in abridging and condensing the briefs so as to bring them within the terms of the law. In doing so, they have necessarily impaired the force of many of the arguments. The law, however, was imperative; and as the briefs in the cases submitted at the time of its passage were subjected to its operation, the reporters had no option but to exclude them altogether

Digitized by Google

or to endeavor to bring them into the allowed compass. They adopted the latter alternative.

In future, however, a different course will be pursued. The brief that does not accord with the law, will be excluded.

This volume contains all the decisions, (with a few exceptions) delivered by the court up to its adjournment in May last, that have not been previously reported.

VICKSBURG, JULY 18, 1846.

Digitized by Google

TABLE

OF THE CASES REPORTED.

	PAGE.
Anderson *v.* Burke	475
Anderson *v.* Tarpley	507
Anderson *v.* Tyson	244
Atchison *v.* Potter	120
Bank of Alabama, Hemphill *v.*	44
Bank of Alabama, Wright *v.*	251
Bank of Port Gibson, Nevitt *v.*	513
Barton, Black *v.*	239
Bell, Merrill *v.*	730
Bingham *v.* Sessions	13
Black *v.* Barton	239
Bonnaffe *v.* Fenner	212
Bradley, Smith *v.*	179
Bradley, Doe, *v.*	485
Brown, Gov. *v.* Phipps	51
Buckingham *v.* Owen	502
Buckles *v.* Cunningham	358
Buckner, Hundley *v.*	70
Burke, Anderson *v.*	475
Byrd *v.* Holloway (two cases)	199
Byrd *v.* Holloway (two cases)	323
Calmes *v.* Ford	190
Carson *v.* Huntington	111
Carter *v.* Taylor	367
Chisholm, Commercial Bank of Manchester *v.*	457
Collins *v.* McCargo	128
Commercial Bank of Manchester *v.* Chisholm	457
Commercial Bank of Natchez, Paine *v.*	24
Commercial Bank of Manchester *v.* The State	218
Commercial Bank of Natchez *v.* The State	599
Commercial Bank of Rodney, Smith *v.*	83
Compton *v.* Compton	194
Cooley, Leach *v.*	93
Cook, McDowell *v.*	420
Cothran, Ransom *v.*	167
Crowder, Harrison *v.*	464
Cunningham, Buckles *v.*	358
Davis *v.* Pryor	114
Dennis, Jennings *v.*	379
Dennis, Reaves *v.*	89
Doe *v.* Bradley	485
Farr, Moody *v.*	100
Fenner, Bonnaffe, *v.*	212
Ford, Calmes *v.*	190
Fuller, Seltzer *v.*	185
Fultz *v.* House	404
Gaunt, Grover *v.*	317
Godley *v.* Goodloe	255
Goodloe, Goodley *v.*	255
Grant, Rupert *v.*	433
Graves, Puckett *v.*	384
Grover *v.* Gaunt	317
Guyot, Henderson *v.*	209
Hargrove *v.* Martin	61
Hargrove, Upshur *v.*	286
Harmon *v.* Sanderson	41
Harney, Parham *v.*	55
Harrison *v.* Crowder	464
Hariston *v.* Sale	634
Harkins, Lovelady *v.*	412
Hazlip *v.* Leggett	326
Hazlip *v.* Noland	294
Hemphill *v.* Bank of Alabama	44
Henderson, Hill *v.*	351
Henderson, Guyot	209
Henderson *v.* Mississippi Union Bank	314
Henry *v.* Hoover	417
Hightower, Wilty *v.*	345
Hill *v.* Henderson	351
Holloway, Byrd *v.* (two cases)	199
Holloway, Byrd *v.* (two cases)	323
Hoover, Henry *v.*	417
House, Fultz *v.*	404
Humphreys *v.* Irvine	205
Hundley *v.* Buckner	70
Huntington, Carson *v.*	111
Irvine, Humphreys *v.*	205

Digitized by Google

	PAGE.
Jack *v.* the State	494
James *v.* Rowan	393
Jennings *v.* Dennis	379
King, Spear *v.*	276
Land *v.* Warner	155
Lanier *v.* Trigg	641
Laughman *v.* Thompson	259
Lee, Woodhouse *v.*	161
Leech *v.* Cooley	93
Leggett *v.* Morris	723
Leggett *v.* Hazlip	326
Lovelady *v.* Harkins	412
Manley, Taylor *v.*	305
Martin, Hargrove *v.*	61
Massingill, McKiernan *v.*	375
McCargo, Collins *v.*	128
McDowell *v.* Cook	420
McDugald *v.* Union Bank	333
McKiernan *v.* Massingill	375
McRae, Terral *v.*	136
Merrill *v.* Bell	730
Mississippi and Alabama Railroad Co., Smith *v.*	179
Mississippi Union Bank, Henderson *v.*	314
Moody *v.* Farr	100
Morris, Leggett *v.*	723
Muirhead *v.* Muirhead	451
Nevitt *v.* Bank of Port Gibson	513
Noland, Hazlip *v.*	294
Owen, Buckingham *v.*	502
Parham *v.* Harney	55
Payne *v.* Commercial Bank of Natchez	24
Pendleton *v.* Pendleton	448
Perry *v.* Randolph	335
Petrie *v.* Wright	647
Phillips, Washburn *v.*	425
Phipps, Brown, Gov. *v.*	51
Planters Bank *v.* The State	628
Potter, Atchison *v.*	120
Prestige, Smith *v.*	478
Pryor, Davis *v.*	114
Puckett *v.* Graves	384
Randolph, Perry *v.*	
Ransom *v.* Cothran,	167
Read *v.* Renaud	79
Reaves *v.* Dennis	89
Reily, Vanhouten *v.*	440
Renaud, Read *v.*	79
Rowan, James *v.*	393
Rupert *v.* Grant	433
Sale, Hariston *v.*	634
Sanderson, Harmon *v.*	41
Scott, Searles *v.*	246
Searles *v.* Scott	246
Seltzer *v.* Fuller	185
Sessions, Bingham *v.*	13
Smart *v.* Whaley	308
Smith *v.* Bradley	179
Smith *v.* Commercial Bank of Rodney	83
Smith *v.* Miss. and Ala. Railroad Co.	179
Smith *v.* Prestige	478
Spear *v.* King	276
State *v.* Commercial Bank of Manchester	218
State, Commercial Bank of Natchez *v.*	599
State, Jack *v.*	494
State, Planters Bank *v.*	628
Tarpley, Anderson *v.*	507
Taylor *v.* Manley	305
Taylor, Carter *v.*	367
Terral *v.* McRae	136
Terry *v.* Woods	139
Thompson, Laughman *v.*	259
Trigg, Lanier *v.*	641
Tyson, Anderson *v.*	244
Upshur *v.* Hargrove	286
Union Bank McDugald *v.*	333
Vanhouten *v.* Reily	440
Wallace *v.* Wingate	151
Ware *v.* Washington	737
Warner, Land *v.*	155
Washburn *v.* Phillips	425
Washington, Ware *v.*	337
Whaley, Smart *v.*	308
Wilty *v.* Hightower	345
Wingate, Wallace *v.*	151
Wingate, Wooten *v.*	271
Woods, Terry *v.*	139
Woodhouse *v.* Lee	161
Wooten *v.* Wingate	271
Wright *v.* Bank of Alabama	251
Wright, Petrie *v.*	647

Digitized by Google

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ERRORS AND APPEALS

FOR THE

STATE OF MISSISSIPPI.

JANUARY TERM, 1846.

WILLIAM BINGHAM *vs.* ISAAC B. SESSIONS et al.

The plea to an action of assumpsit on a promissory note, that the plaintiff was not the lawful owner or bearer of the note sued upon at the time of the commencement of the suit, is bad as amounting to the general issue.

A plea to an action on a note, that the note was obtained by duress, and setting forth in a detail of circumstances the nature of the duress in the procurement of the note, is not by such detail, even if unnecessary, vitiated.

A plea to an action on a note, that the note was given to obtain the release of certain property levied on by virtue of a certain execution, which was fraudulently issued on a judgment previously satisfied, under which execution the plaintiff threatened to sell the property thus levied on, *held* to be bad on demurrer.

A note given to obtain the release of property from an illegal levy is not void; the maker has his redress by action against the judgment creditor, or the option to give the note; if he elect the latter, he is bound by it.

A plea to an action on a note, that the note was obtained by duress, through the fraudulent levy of an execution by the plaintiff therein; though bad as

Digitized by Google

a plea of duress, should be so amended by the permission of the court, as to allow the defence arising out of the fraud of the plaintiff, to be made.

In error from the Choctaw county circuit court; Hon. Benjamin F. Caruthers, judge.

William Bingham sued Isaac B. Sessions, Elberd Neal and William Sperlin, upon a note for $1879 98, dated January 3, 1842, and due twelve months after to Edward Johnson or bearer, and by Johnson transferred to the plaintiff; on the note a credit of $1656 30, was indorsed on the 6th September, 1842.

The defendants appeared and plead, 1. payment; 2. that the plaintiff was not the lawful holder, owner or bearer of said note when the suit was instituted, but that the note then and still was the property of another person; 3, that the note in the declaration mentioned, was obtained from the defendants by the said Edward Johnson, the payee, by duress; that at and before the time the note was executed, Johnson, as sheriff of Choctaw county, held in his hands two writs of *fi. fa.*, one in favor of said Elberd Neal, for the sum of thirty-two hundred and seventy-seven dollars, or thereabouts, on a judgment rendered in his favor against William Sperlin, on the 27th day of September, A. D. 1841, in the circuit court of Choctaw county; the other in favor of Isaac B. Sessions, for the sum of twenty-one hundred and seven dollars or thereabouts, on a judgment rendered in favor of said Sessions against said William Sperlin, on the 27th day of September, A. D. 1841, in the circuit court aforesaid; which executions were issued on the 8th day of November, 1841; that after these executions were levied on the personal and real estate of said Sperlin, and the same duly advertised for sale, on the day when the personal property being eight likely negroes, besides other property, was to be sold, to wit, on the 3d day of January, A. D. 1842, Johnson, a sheriff, corruptly and illegally procured to be issued from the circuit clerk's office of that county, an execution on a judgment in favor of Milton T. Caperton against said Sperlin, Elias Spencer, John G. Neal and said Elberd Neal, which judgment Johnson

Digitized by Google

well knew at that time, had long before that time been fully satisfied and paid off to him, the said Johnson, as sheriff as aforesaid, under other executions that had previously been issued thereon, for the express and avowed purpose of procuring and compelling said defendants to execute the note sued upon; that Johnson, as sheriff, for the purpose of more effectually accomplishing this illegal, corrupt and fraudulent purpose, did have the execution in favor of Caperton falsely *ante* dated so as to bear date on the 23d day of December, A. D. 1841, when in fact and in truth it was issued on the 3d day of January, 1842; that for the further purpose of injuring, defrauding and oppressing the defendants, and depriving them of their rights, Johnson, as sheriff, falsely and fraudulently indorsed on the execution in favor of Caperton, that he had received the same on the 23d day of December, A. D. 1841, when in fact he did not receive the same until the 3d day of January, A. D. 1842; that Johnson, as sheriff, for the further purpose of defrauding the defendants, levied said execution on the negroes, which had been previously levied upon by the aforesaid executions in favor of Sessions and Neal, and did then and there, on the said 3d day of January, A. D. 1842, being the sale day of said negroes, and before the same were sold, threaten said defendants that unless they executed the said note, he would sell said negroes and other personal property under the execution in favor of Caperton, and appropriate the money to Caperton's execution, and by that means prevent Sessions and Neal from obtaining any part of the money due on their executions; that Johnson, as sheriff, as aforesaid, the more certainly to effect his fraudulent purposes, falsely indorsed on the execution in favor of Caperton, that it had been on the 24th day of December, A. D. 1841, levied on the said negroes, when in fact, if a levy was ever made, it was made on the 3d of January, 1842; that Sessions and Neal, fearing that if the sale was made as threatened by Johnson, the negroes would be purchased in by him and his minions at ruinous prices, and be borne off beyond the jurisdiction of the court, and that they would thereby thus lose their debt; executed while thus under duress said note for the sole purpose of protecting

Digitized by Google

their rights and interests, and for no other purpose or consideration whatever; that said Sperlin, knowing that said Caperton's execution had long before that time been fully paid off and satisfied in full, and fearing that said Edward Johnson would, by carrying said threat into execution, make way with the whole of his personal property, at the most ruinous sacrifices, and by that means leave the said executions in favor of Neal and Sessions and other just claims, unsatisfied and hanging over him, consented, while thus under duress, to execute, and did, under the influence of said threat and while thus under duress of Johnson, execute the note, and for no other consideration.

Issue was taken on the first plea; the second and third pleas were demurred to; the second, on the ground that it was uncertain, and amounted to the general issue; the third, on the ground that it was uncertain, double, sought to put in issue irrelevant facts, and did not make out a case of duress.

The court below overruled the demurrer, and gave judgment for the defendants; from which the plaintiff prosecutes this writ of error.

Waul, for plaintiff in error.

1. The second plea states that the note sued on was the property of a different person from the plaintiff.

1st. The plea does not aver in whom is vested the property, if the note and payment to the holder, who is *prima facie* the owner, would be a satisfaction without notice to the payee, that the property was in some other person, and if notice was given, then the payee should aver and prove who the owner was, and not compel the plaintiff to join in an uncertain issue.

2d. The plea neither traverses nor confesses, and avoids the declaration, and gives no color of title to plaintiff, and is therefore defective. Stephen on Pleading, 421.

3d. It amounts to the general issue, being an argumentative denial of the whole contract, which is not allowed. Stephen on Pleading, 419; 5 Adol. & Ellis, 31 C. L. Rep. 309.

2. The gravamen of the third plea is the duress complained of, by force of which the defendants were compelled to give

Digitized by Google

their note, although the plea does not show any duress of the goods of the defendants, Sessions and Neal.

And though it did show duress, if they would plead it in avoidance of a contract, the duress must be of the person, and cannot be of the goods. 2 Stark. on Ev. 287; Chitty on Con. 168, and notes.

There are two cases in Bay's South Carolina Reports which support a contrary doctrine, but they are unsustained by the authorities referred to, and cited to be overruled wherever insisted on as authority.

Acee, for defendants in error.

The first position assumed by the counsel for the appellant, that, the second plea of the appellees is defective, because it does not aver in whom was vested the property of the note, is neither sustainable upon principle nor supported by precedent.

In the case of *Bryant* v. *Owen*, 2 Stewart & Porter's R. 134, in which a plea, precisely similar to the one in question, was filed, it was expressly declared, "that the court considered the plaintiff's right of recovery to depend on the truth of the fact whether or not he was the owner of the note, and notwithstanding the legal presumption of ownership, it was subject to be rebutted; and if successfully done, the plaintiff must fail in his action."

In the case cited the plea of *non assumpsit* was also filed by the defendant — which was not done in the suit at bar, which renders the authority doubly strong in favor of the appellees, who relied alone on special pleas.

The second objection of the counsel for the appellant is not better taken, for the plea not only admits the execution of the note as described in the declaration, but sets up a sufficient legal defence against the plaintiff's right of action.

The third objection, that the plea amounts to the general issue, is equally untenable. "That matter is specially pleaded which may be available under the general issue is not cause for demurrer." *Brown* v. *Jones*, 3 Porter's R. 429.

At common law a party might plead *non est factum* and

Digitized by Google

escrow together, though evidence allowable under the latter might be given under the former. *Tindal* v. *Bright*, Alab. R. 103. And in the case of *Dunham et al.* v. *Ridgel*, 2 Stewart & Porter, 402 – 4, the court, in commenting upon the effect of a statute similar to ours upon the subject of pleadings, said, "the statute entitles the defendant to as many several pleas as he may deem necessary to his defence; therefore, it is no objection to a legitimate special plea, that the same matter of defence would be available under the general issue."

The exceptions taken by the counsel for the appellant to the third plea of the appellees, are equally untenable.

"The defendant is not precluded from introducing several matters into his plea, if they be constituent parts of the same entire defence, and form one connected proposition." 1 Chitty's Pleadings, 456 – 7, 5th Am. ed.; *Ellis* v. *Martin, use, &c.*, 2 S. & M. 189.

But the counsel for the appellant contends, that the plea is defective, because duress must be of the person, and not of the goods of the defendant.

The authorities relied upon by the appellant have long since been overruled. In the case of *Foshay* v. *Ferguson*, 5 Hill's R. 154, the chief justice says: "I entertain no doubt that a contract procured by threats, and the fear of battery or the destruction of property, may be avoided on the ground of duress." The plea of duress in the case at bar alleges that, the appellant threatened to deprive the defendants, by illegal means, of their property, which brings the case within the rule laid down in the authority just cited — and judging it by that test constitutes it a good plea.

A note or bond executed by a party while under the apprehension of injury, in the absence of threatening language, will be avoided on the ground of duress. *Evans* v. *Huey and Franklin*, 1 Bay's R. 13. And the benefit of the plea enures to the surety. 1 Bay's R. 13.

So duress of goods will avoid a man's act. *Sasportas* v. *Jennings and Woodrop*, 1 Bay's R. 470; *Nelson* v. *Suddarth*, 1 Hen. & Mun. 350.

Digitized by Google

Again. In a case not dissimilar to the one at bar, it was expressly declared, "that duress of goods or negroes is a good plea to a bond given to procure their release under hard and pressing circumstances, which are very proper for the consideration of a jury." 2 Bay's R. 211; 2 Powell on Contracts, 159.

Even, if the facts stated in the plea do not amount to what in legal contemplation is deemed duress, still it is a good plea and cannot be reached by a demurrer.

No principle is better settled than that a contract, to be valid and binding, must not only be made by parties who are able but who willingly and voluntarily agree to the same. In the case at bar, there was nothing but the form of a contract without the substance, for the appellees were compelled under hard and oppressive, and illegal circumstances, to execute the note now sought to be avoided.

Gray, on same side.

The errors relied on are, that the court erred in overruling the demurrer to the second and third pleas. The demurrer assigns for cause, as to the second plea, that the same amounts to the general issue, and ought not to be pleaded; and also that it is uncertain. As to the first cause of objection, it will be sufficient to examine the plea itself, in order to expose the fallacy of this position. It does not amount to the general issue. What does this general issue amount to, and what could be given in evidence under it? At the common law any thing could be given in evidence under the general issue which went to prove that the plaintiff had no cause of action. If the plea pleaded amount to the general issue it must be equal to it, and must cover as broad ground of defence as the general issue itself. Could then any defence be made out under this plea which by the common law could be made out under the general issue? Clearly not. Fraud might be proved under the general issue. Total want of consideration, and by the common law entire payment might be given in evidence under that plea; none of which defences could be made out under this. And there is likewise a plain distinction to be drawn between the rules of

Digitized by Google

practice in England in reference to pleadings, and those which prevail under our statute. There a defendant could (except by leave of the court) plead but one plea; here he may plead as many as he thinks fit. This is a matter of right, secured to a defendant under our statutory law. See H. & H. 589, 597. It has never been held an objection to the pleas of fraud, failure of consideration, or want of consideration, that the same were allowable in evidence under the general issue, whenever the same have been pleaded, unless the general issue had been at the same time pleaded with them. Nor would it then be a good objection under our statute. The other objection that the plea is uncertain, is equally untenable. It advises the plaintiff that the defence relied on is his want of title, and this he knows better than any one else how to avoid. Being cognizant of how, and from whom he derived it, he came prepared with the necessary proof to sustain his title. The defendant might not know in whom the title vested, although he might have heard the plaintiff confess that he himself had no title. The want of title of the plaintiff is the real defence set up, and this is averred with sufficient certainty.

As to the objection taken to the third and last plea it seems to be intended at the outset as a plea of duress; but contains substantially such facts as would make it good as a defence upon the ground of fraud, even admitting it not to be good as a plea of duress. The plaintiff, by his demurrer, admits such facts as would unquestionably avoid his note, if the same have been properly pleaded. What is the object of pleading? It is unquestionably to bring to the notice of the court, in a certain and definite manner, such matters of fact, or of law, as would avoid in whole or in part, the cause of action. If this has been done with sufficient certainty it is sufficient, and the end of the law has been attained. A plea is not doubted, if it consist of numerous facts or matters of law, all tending to establish the same defence. The rule is, that two different matters of avoidance, each of which constitutes, or would constitute a defence, should not be pleaded in the same plea; but it has always been held that when the facts stated, however numerous they

Digitized by Google

may be, all tend to establish but one matter of defence, the plea containing them will not be bad on account of duplicity. This principle is too well settled to require authority to be cited in support of it.

But, is the plea not substantially good as a plea of duress? Many respectable authorities can be found sustaining the plea as a valid plea of duress. See 1 Bay's R. 13; Ibid. 470.

Mr. Justice THACHER delivered the opinion of the court.

Writ of error to Choctaw county circuit court.

This case comes up on exceptions to the action of the court below in overruling a demurrer to two special pleas.

The first plea, to which the demurrer was overruled, was, that the plaintiff was not the lawful owner or bearer of the note sued upon at the time of the commencement of the suit. A plea of this kind, and in this form, has already been decided by this court to amount to nothing more than the general issue. *Netterville et al.* v. *Stevens et al.* 2 How. 642.

The second plea, to which the demurrer was overruled, avers that the note upon which suit was instituted was obtained by duress, and then proceeds to narrate a series of circumstances purporting to set out the mode by which the duress was effected. It is objected to the form of this plea, that it is double. The details of the circumstances, although various and numerous, constitute but one connected proposition, and tend to raise but one issue, that of duress in the procurement of the note. Such a narrative of circumstances, even if possibly unnecessary, does not vitiate a special plea. *Ellis* v. *Martin, use, &c.*, 2 S. & M. 187. It is objected to the matter of the plea that it bases the duress upon fears created in the minds of the defendants below, from apprehensions that they were about to be illegally deprived of their property and rights, unless they executed the note in question. In the plea the duress is described to have originated in an illegal issuance of an execution, and levy upon property. A question of this kind was examined in *Foshay* v. *Ferguson*, 5 Hill, 154, in which the court says that a man cannot avoid his contract on the ground

Digitized by Google

that it was procured by an illegal distress upon his goods. The old rule was, that one could not avoid his act on the ground that it was procured by the fear of battery, burning his house, taking away or destroying his goods, or the like, because he might have satisfaction by the recovery of damages. 2 Inst. 483. In later days this rule has been much modified, and the principle admitted that a contract procured by threats and the fear of battery, or the destruction of property, may be avoided on the ground of duress. 5 Hill, 158. The case quoted by counsel, (*Sasportas* v. *Jennings*, 1 Bay, 470,) decides that there might be cases where duress of goods would avoid a man's act, but does not decide that duress of goods, as a general rule, will avoid a contract made by its means. It sustains its opinion upon the reason upon which Lord Coke and Judge Blackstone lay down the general rule, which is, that the party may not have, under some such circumstances, an adequate satisfaction in damages, for the injury; but whenever the person committing the injury has the ability to make recompense, and there exists a prompt and effectual method to compel it, the reason for the exception to the general rule ceases. It might not, also, be going too far to say, that such circumstances may surround a person as to render it urgent and imperative on him to relieve himself by entering into a forced contract of this kind; yet such a situation would be, in point of fact, but a position in which there was an absence of ready and ordinary mode of redress, and therefore relate to the general rule. If, upon all the facts, it appears that the party might have exercised his choice, either to enter into the contract, or to seek and obtain his relief by action, the defence of duress would be bad. The circumstances detailed in this plea do not present such a case of extremity as has been just contemplated, but, on the other hand, show that sufficient and prompt relief could have been controlled.

The judgment of the court below is therefore reversed, the demurrer to the second and third pleas directed to be sustained, and the cause remanded for further proceedings. This court, moreover, while not empowered to make a peremptory order

Digitized by Google

for an amendment, desires to intimate the opinion that the third plea, although insufficient as a plea of duress, contains, in substance, a charge of fraud, and would recommend that leave should be allowed by the court below to the defendant there so to amend the third plea as to bring the merits of the case to issue.

Digitized by Google

James Payne et al. *vs.* The Commercial Bank of Natchez.

A mere voluntary engagement to indulge the principal debtor will not discharge the surety.

There must be a positive and binding agreement between the creditor and principal debtor, based upon some new and valuable consideration, sufficient to tie up the creditor, and prevent him from asserting any remedy, during the time for which the indulgence has been given, against the principal, in order to effect a release of the surety.

L. being indebted to the Commercial Bank, in various notes, upon which he was liable, either as indorser or maker, and on which other persons were sureties for him, to reduce his liability to a single amount, proposed to the cashier of the bank to execute his individual note for the sum total due the bank, and confess a judgment, in Louisiana, on the note thus made, which judgment should bind all his property, and be in discharge of the notes on which he was liable; the cashier, on consultation with several of the directors, agreed to the arrangement, to be consummated when L. had, at his own expense, carried the arrangement into effect, and exhibited to the bank satisfactory evidence of it. L. after this agreement, and before he confessed the judgment, sold all of his property in Louisiana which the judgment was to bind, to B., and then executed his note for the sum total, payable to the bank, and confessed the judgment, as agreed upon: *Held*, that the agreement of the bank, being purely conditional, and that condition not being complied with by L., the bank might disregard the arrangement with L. and sue upon the original notes against all the parties to them.

A creditor who takes collateral security for his debt, is bound to hold it impartially and justly; and if it be lost by his negligence or improper conduct, the surety on such debt may bar the creditor of so much of his demand as he might have received from such collateral.

L. being indebted to a bank on sundry notes, as maker or indorser, on some of which notes other persons were bound as sureties for him, proposed an arrangement to the bank for their adjustment, by the substitution of his individual separate note for the sum total, to be secured by confession of judgment to bind his property in Louisiana, to which proposal the bank acceded; to be complete when proper evidence of its consummation was given to the bank. Previous to this proposal L. had deposited with the bank two hundred shares of bank stock as collateral security for the payment of these notes. L., having first sold his property in Louisiana, executed his note,

Digitized by Google

and confessed the judgment in favor of the bank, without notifying the bank, or the bank's ratifying it; execution issued on this judgment, and the sheriff, to whose hands it came in Louisiana, sold the bank stock for $2200, to B., and gave B. an order on the bank for the stock, which delivered it to B.; the bank never received the proceeds of the sale of the bank stock, nor did it appear what had become of them: *Held*, in a suit by the bank on the original notes, that the parties to them were not entitled to a credit thereon for the amount of said stock; as the security of the stock had not been lost; for if the sheriff's sale changed the title, its proceeds would be within their reach, and if the sale had not changed the title the stock would be subject to their order.

Where in an action by a bank against the parties to a note held by it, it appeared in proof that the cashier of the bank had made an agreement which, if carried out, would have discharged all the parties to the note but one; and that he had made that agreement after consulting with two or more of the directors, and the court instructed the jury that the cashier of the bank had no authority to bind the bank by any contract that would release parties, but that if he acted on consultation with two or more of the directors, then his acts would be binding on the bank; *held*, that the entire instruction, taken together, and applied to the facts, would not be erroneous in its conclusion.

In error, from the Adams circuit court, Hon. C. C. Cage, judge.

The Commercial Bank of Natchez sued Simon Murchison and Harrison Doyal, James Payne and John P. Walworth, as indorsers of a note made by Silas Lillard, for the sum of $7076 88, dated February 5, 1838, and payable twelve months after date. In the declaration, Lillard was averred to be a non-resident.

The defendants plead non-assumpsit, accompanied with notice that under that plea they would set up as defence that the plaintiffs had discharged the defendants from liability as indorsers on the note sued on, by giving time to the maker of the said note, on good consideration, without their consent; the plaintiffs having taken a new note from the maker, and a confession of judgment thereon, and made sale of property of the maker, under the judgment, and which last note they expected to prove was given in consideration, partly, of the note on which the defendants were sued.

Digitized by Google

The case was, on this state of pleading, submitted to a jury, who found for the plaintiff the full amount of principal and interest sued for. The defendants moved for a new trial, which was refused, and they filed a bill of exceptions; from which the following facts appear:

The plaintiffs having read the note sued on, and fixed the liability of the indorsers by proof of demand and notice, the defendants read the deposition of Lillard, the maker of the note, who testified that about the 28th day of March, 1840, he executed and delivered to the plaintiffs a note for $31,593 02, payable three days after date; the consideration of which was for sundry notes, for which he was liable as drawer and indorser; the single note being given to concentrate all his indebtedness to the plaintiffs into one debt, including the note sued on; that the single note given by him was then in judgment in the district court of Louisiana, in and for the parish of Concordia; that $2200 of it had been paid by the sale of two hundred shares of stock in the Commercial Bank of Manchester, in the summer of 1840; that the plaintiffs held as security for this note, upon which judgment had been thus confessed, the said bank stock, and the notes of R. C. Ballard, amounting to $30,000, with a mortgage on his plantation in Louisiana, to secure the payment of the same; that this confessed judgment was a lien on the said stock, and notice of said Ballard; that previous to the confession of judgment he had sold his plantation in Louisiana, to Ballard, and taken from him, in part payment, and for the purpose of selling his debt to the plaintiffs, the notes of Ballard, for $30,000 secured by mortgage upon the property, and had also taken the $20,000 in the stock above-mentioned; that he offered to the plaintiffs in payment of this note for $31,593 02, the stock and the notes of Ballard; which notes the bank might have sold under the judgment, in Louisiana, as it did the stock; but it disliked the notes, and returned them to him after the judgment; and one of them was subsequently paid to the bank for the United States Bank, for another debt of his to that bank. The bank stock sold for eleven dollars a share, but was worth from fifty to seventy-five.

Digitized by Google

The defendants read also to the jury the manuscript from the records of the district court of the parish of Concordia, of the suit of the bank against Lillard, on the note for $31,593 02; by which it appeared that the bank had filed its petition upon a note of that amount, dated March 28, 1840, payable to the plaintiffs, three days after date; upon which a judgment final was rendered on the 21st day of December, A. D. 1840; an execution issued upon this judgment, and was levied on two hundred shares of bank stock of the Commercial Bank of Manchester, of the state of Mississippi, as the property of Lillard; and which was sold under the execution to Ballard, for the price of eleven dollars per share.

To rebut this testimony, on the part of the plaintiffs, Thomas Henderson testified that he was cashier of the Commercial Bank of Natchez, when Lillard called at the bank to make an arrangement to take up all his liabilities to the bank; that Lillard proposed to confess a judgment for the full amount due, and put the judgment in such a position as to bind all his property; to employ his own counsel, and to pay the expenses attending the confession of said judgment.

That, after consulting one or two of the directors, he agreed with Lillard that when the judgment should have been confessed, so as to bind all of his property, and evidence of the fact produced to the bank, that the bank would give up the paper of Lillard, including the note sued on, and discharge his securities; that in order to complete the arrangement Lillard called on him for a memorandum of the amount due the bank, which he gave to him. The agreement was entirely a conditional one, intended and understood to depend on the confession of judgment in such a manner as to bind all Lillard's property in the state of Louisiana, and on the condition that it should be so confessed, and the bank notified of it at Lillard's expense.

That after this understanding took place, and before any confession of judgment, Lillard sold his plantation and negroes in Louisiana to Ballard, which was the property intended to be bound by the judgment to be confessed.

That some time before this understanding took place, Lillard

Digitized by Google

delivered to him two hundred shares of stock in the Commercial Bank of Manchester, which he was to hold for Lillard, as collateral security for all of his debts due the bank, including the one sued on in the pending suit. That after the sale of the property to Ballard, Lillard confessed a judgment to the bank, and execution issued on it, under which the bank stock was sold to Ballard for the $2200; but the plaintiffs had never received any portion of it.

That he never gave, and never agreed to give, any time or indulgence to Lillard, in any manner whatever. That he gave Lillard the memorandum referred to at his own request, and to enable him to carry out his own arrangement. That he had no authority, by any resolution of the board of directors, or otherwise, to make any arrangement with Lillard, but that he was in the habit of making such arrangements, in consultation with some of the directors.

That the bank stock was given to him by Lillard, after the maturity of all Lillard's liabilities, and was delivered up to Ballard by order of the sheriff of Concordia parish, Louisiana, who had sold it under execution. That the bank did not any time relinquish the right to sue, either Lillard or his indorsers.

On this testimony, at the instance of the plaintiffs, the court charged the jury:

1. That the agent, or cashier, has no authority to bind the bank by a contract that would release parties from the note.

2. To release an indorser the engagement must be upon a good consideration, and binding, and on that will suspend the remedy of the holder, so as to prevent his bringing any action upon the note.

3. Unless the judgment given by Lillard in Louisiana, bound all his property, and secures the lien to the plaintiffs, and that this contract was ratified and agreed to by the plaintiffs, the law is with the plaintiffs.

To which charges the defendants excepted, and moved for the following:

1. If the jury believe that the plaintiff had, as collateral security for the payment of the note sued on, two hundred shares

Digitized by Google

of bank stock, and voluntarily parted with it, either by suffering it to be withdrawn by the party depositing it, or by sale, without authority and consent of the indorsers, or by due course of law, the indorsers are thereby legally discharged, at least to the extent of the security which was deposited.

2. If the jury believe that the plaintiffs gave the maker of the note any delay whatever, even one day, on a valid agreement, without the consent of the indorsers, the indorsers are thereby discharged.

3. That if a party takes from his debtor a note payable three days after date, in payment of a precedent debt, he cannot proceed upon either the debt or the note, until after the three days.

4. The testimony of Lillard, that he gave the $31,000 note to the bank, is competent evidence until disproved.

5. That if they believe the stock was in bank as collateral security for this debt and others, and has been given up by the bank without the assent of the indorsers, then they are released for an amount equal to the portion of stock to which it would be entitled.

6. That if the acts of the cashier were made in consultation with two or more of the directors, such acts are binding on the bank.

7. If they believe the cashier was authorized to make such contracts as are set up in the defence, it was binding on the bank.

8. If plaintiffs accepted of the judgment against Lillard in Louisiana, and undertook to enforce satisfaction, by execution, it may be presumed they accepted it in satisfaction of the notes held by the bank, in accordance with the agreement with the cashier. All of which were given.

The defendants prosecute this writ of error.

Montgomery and *Boyd*, for plaintiffs in error.

From the whole of the testimony we think it is clear that the plaintiffs entered into an informal agreement with Lillard for the liquidation of the note sued on; but owing to the change of

Digitized by Google

the condition of Lillard's property, before the arrangement was completed, it was broken off, and nothing definite done. The testimony, however, is somewhat contradictory, and therefore the law should have been properly propounded, so that they could apply it to the facts as they understood them. The first charge given was calculated to lead the mind of the jury from the investigation of the true issue. It was virtually withdrawing from the jury the consideration of the question how far Henderson's agreement as cashier, constituted a valid agreement to give time to Lillard, without the knowledge or consent of the indorsers of the note. And we think, from the evidence of Lillard and Henderson, there was a valid agreement to give time, until the confession of judgment in Louisiana, which would operate as a lien. And such an agreement would discharge the indorsers. The acts of the parties under the agreement shows the understanding they had of its meaning. The circumstance that Lillard confessed a judgment for the debt, under which an execution issued, which was levied on stock of the Commercial Bank of Manchester, which was then in the possession of the plaintiffs, as collateral security for this debt, and that the plaintiffs delivered the stock to the purchaser, under the sheriff's order, tend very strongly to show, that until then at least all parties were satisfied with and disposed to complete the arrangement, and for that purpose time was given the maker of the note.

Now, had the cashier authority to make such an arrangement? We think he had, according to law, the custom of the bank, and his own evidence as to his powers. As a general rule the agents of a corporation, acting within the scope of their agency, can bind the corporation by simple contract, as well as by specialty. 3 Harris & John. 367; 3 Halst. 182; 8 Pick. 178.

But if the cashier was not authorized by his general powers, yet, as he made the agreement, and the plaintiffs availed themselves of its benefits, so far as to cause a sale of the bank stock, such act satisfies the contract, and makes the corporation liable. 1 Pick. 372; 7 Cranch, 299; 19 John. 60.

Digitized by Google

The evidence of Henderson, that he was in the habit of making such arrangements, with the advice of two or three directors, proves that it was the custom of the bank to transact business in that manner.

If we are correct in these positions, the defendants were discharged, and the jury should have so found.

But if the whole negotiation and arrangement with Lillard passes for nothing, then we insist the defendants were, under the law and the evidence, entitled to a credit for a proportional amount of the true value of the bank stock, which was held as collateral security for this and other notes, amounting, in all, to $31,593, which would entitle this case to a credit of about thirty per cent. of the bank stock. 4 John. C. R. 129; 1 McCord's Ch. R. 112.

If the creditor releases any of the securities he has for the payment of the debt, it discharges the surety. 1 McCord Ch. R. 443. It at least amounts to a discharge *pro tanto*. 3 Paige's R. 614; 1 John. C. R. 414; 6 Mon. R. 188; Pothier on Ob. No. 520; Pow. on Mort. 871, note; 1 Nott. & McCord, 118.

Eustis, on the same side.

It seems to us that this was an agreement on the part of the creditor giving time to the principal without consent of the surety. Take the agreement as understood by the cashier, it is evident that time was necessary, within which to comply with the conditions; a reasonable time to perfect the judgment, and obtain the required lien, was the right of Lillard in order to fulfil conditions, which fulfilled, would have discharged the note now sued on. During this reasonable time, the bank could not have sued.

"The rule is, that when a creditor without the consent of the sureties, gives time (by express agreement, not by mere quiescence) to the principal debtor, by so doing he discharges the surety." *Samuel* v. *Howarth*, 3 Meriv. 278; *Eyre* v. *Bartrop*, 3 Mad. 225; *Bedford* v. *Deakin*, 2 Barn. & Ald. 214.

Our legislature has placed the indorser on the footing of a

Digitized by Google

surety. In *Rees* v. *Barrington*, 2 Ves. jr. 543, Lord Loughborough says, "It amounts to this, there shall be no transaction with the principal debtor without acquainting the person who has a great interest in it."

True, this is in equity; but *King* v. *Baldwin*, 2 J. C. R. 554, shows that the defence should be made at law. We may look to equity cases to see if the transaction amounts to a release; and if so, then that release is matter of defence at law.

But it is evident that the charge of the circuit judge led the jury to believe that the act of the cashier did not bind the bank. We have hitherto thought that the cashier was the especial organ of the bank in all such cases. What he assumes to do, that the world have a right to believe he is authorized to do, so far as the bank is concerned. It is for the bank to see that he does not exceed his authority. Suppose Lillard had had the amount to his credit, and the cashier had paid it over to him, the sureties would have been released. Such seems to be the law.

"Nothing is more clear than whether that was done with the consent and by the order of the company or not, but ignorantly by their officers, it was as to the sureties a complete discharge." *Law* v. *East India Company*, 4 Ves. jr. 829, and note.

The sum of two thousand two hundred dollars, for which the stock sold under execution, was a liquidated and ascertained credit, a portion of which should have been allowed by the jury. There was evidence of the sum total for which the stock was security; there was also evidence of the sum sued on in this action, the proportion which the latter sum bore to the former, would settle the portion of said sum of two thousand two hundred dollars, which should have been allowed by the jury as a credit. This being a suit under the joint action law, the plea of *non assumpsit* admitted proof of this credit, and if not now entered, the new trial should be granted.

"If the creditor has any security from the debtor, and he parts with it, without communication with the surety or by gross negligence, it is lost; that will operate at least to the value of the security, to discharge the surety." 1 Story Eq. Ju. § 326; *Mayhew* v. *Crocker*, 2 Swanst. 185; *United States*

Digitized by Google

v. *Kirkpatrick*, 9 Wheat. 720; *McLemore* v. *Powell*, 12 Wheat. 554; *Josslyn* v. *Smith*, 3 West, (Vermont) 353.

Quitman and *McMurran*, for defendants in error.

The errors complained of in this case are presented to the consideration of this court, upon the decision of the court below in overruling the motion made by plaintiffs in error for a new trial. No bill of exceptions was taken during the trial of the cause, though in the bill of exceptions upon the overruling the motion for a new trial, the instructions to the jury, &c. are embodied. This, however, cannot alter the position of the case. For it is only under the provisions of the law of 1830, (Rev. Stat. 314,) making decisions upon motions for new trials examinable in this court, that this court has any jurisdiction of the case. And this view of the attitude of the case we deem important to a proper discussion and a correct decision, because the court, in reviewing and deciding on the errors assigned for a reversal of the proceedings of the circuit court, will be governed by different principles from what they would be, examining objections and exceptions taken during the progress of the trial.

Thus, no principle is better established, no rule for the government of courts in deciding on motions for new trials, is more universally recognized than this: "that where justice has been done, on the whole case, between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial." And the granting or refusing a new trial, being a matter resting solely in the sound discretion of the court, "it is to be granted only when in furtherance of substantial justice." *McLanahan et al.* v. *Universal Insurance Company*, 1 Pet. R. 170–183. So, in the case of *Edmondson* v. *Mitchell*, 2 D. & E. 4, where there was a misdirection of the judge to the jury, the court refused a new trial because substantial justice had been done. And if the verdict is consistent with the justice, conscience and equity of the case, no new trial will be granted, though the verdict may be against the weight of evidence, or even the strict

Digitized by Google

rules of law. *Wilkinson* v. *Payne*, 4 D. & E. 468, 469; Salk. 116, 646-648.

Upon the testimony, then, the jury were right in finding the verdict they rendered. The bank had never done any act by which she lost her recourse on Payne and Walworth. Lillard's proposition never was complied with on his part, never was binding for a moment, never was consummated. The bank has never received the payment of the first cent of the debt claimed in this action; the indorsers have never been injured in any way; no time was even granted, nor suit suspended against Lillard or them for an instant. And therefore there is no principle of strict law opposed to the bank's recovery, independently of the liberal rules applicable to the doctrine of new trials, which we have already stated to the court. Besides, the bank would not be bound by such acts of the cashier. 6 Peters, 51; 8 Ibid. 12; Commercial Bank Charter, Acts of 1836, p. 247.

If a debtor voluntarily confesses a judgment in favor of his creditor, if he causes execution to be issued on it, and a sale of property under it, without the knowledge, wish or consent of the creditor, surely it will not be contended, that the creditor is bound thereby, or his rights in any way affected by this conduct of the debtor. *Osgood & Co.* v. *Brown et al.*, 1 Free. R. 392-399; *Reynolds* v. *Nye*, Ibid. 470.

As far as any authorities can be found bearing on the subjects of collateral security and conditional payment, we will find that they support the rights of the bank to the judgment she has recovered against the indorsers, Payne and Walworth. This court say, in its opinion in the case of *Wade et al.* v. *Stanton & Co.*, 5 How. R. 631-634, "that to admit a defence of this character, it was necessary there should be a positive and binding agreement to indulge the debtor, based upon a valuable consideration, sufficient to tie up and restrain the creditor during the period of the new credit," citing 3 Mer. R. 272; 10 J. R. 591; 1 Leigh, 436, &c. So, where a note is taken as conditional payment, it does not bar a suit on the original contract, and party need not show an offer to return the paper taken as conditional payment before suit, &c. 1 Law

Digitized by Google

Library, 79; 4 Car. & Payne, 151; same case in 5 How. 635–36, citing the case of *Clark* v. *Young*, 1 Cranch, 181; Theobald on Principal and Surety, 1 Law Library, 79.

As to the stock placed in Mr. Henderson's hands as collateral security for all Lillard's debts in bank, it can form no legal defence in this action. That matter could be adjusted only by another suit, in equity or at law. Again; the instructions asked of the court on the part of the bank, are all proper and legal, in conformity with the authorities we have referred to. And of the eight instructions asked on the part of Payne and Walworth, the court gave the whole of them in charge. Whether all these be unexceptionable or not in point of law, we will not undertake to assert, but as they w re asked for by the plaintiffs in error, they cannot complain of them.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The plaintiffs in error were sued as indorsers of a promissory note, and after verdict against them, moved for a new trial, which motion was overruled. The defence set up was, that the holder of the note had discharged the indorsers by giving time to the maker.

The question depends mainly on the evidence introduced on the trial, which is to the effect following: — The maker of the note testified, that about the 28th of March, 1840, he executed a note to the plaintiffs below for $31,593, payable three days after date, the consideration of which was sundry notes then held by the bank, on which he was liable, either as maker or indorser; his object being to concentrate all his indebtedness in one note. On being asked where the note given then was, he stated that it was in judgment in Louisiana, and that $2200 had been paid on the judgment by a sale of bank stock, and that the judgment was also a lien on certain promissory notes, given by R. C. Ballard to the witness, for property sold to Ballard, which notes were secured by mortgage. He also stated, that these notes were liable to be sold under execution. A transcript of the judgment in Louisiana was also introduced.

Digitized by Google

To rebut this proof, the plaintiff below introduced Thomas Henderson, the cashier of the bank, who explained the transaction with Lillard, the maker of the note, in the following manner: — Lillard called on him and expressed a wish to take up all his liabilities to the bank, and proposed to confess judgment for the full amount due, and to bind thereby all of his property. On consultation with one or two of the directors, the witness agreed with Lillard, that when such a judgment should be confessed so as to bind all his property, and evidence thereof produced to the bank, the paper of Lillard should be given up, Lillard employing his own attorney, and paying all the expenses incident to the consummation of this arrangement. In order to effect the arrangement, Lillard called on the witness for a statement of the amount of his indebtedness, which was furnished. The agreement was entirely conditional, intended, and so understood, to depend upon the confession of a judgment which should bind all of Lillard's property in Louisiana; and on the further condition, that this should be done at Lillard's expense, and the bank notified. After this understanding took place, and before any confession of judgment, Lillard sold all of his property in Louisiana, consisting of land and negroes, to R. C. Ballard, which was the property intended to have been bound by the judgment. Some time before this understanding took place, Lillard delivered to witness two hundred shares of stock of the Commercial Bank of Manchester, to be held for him, as collateral security for all of his debts due to the bank. After the sale of the property to Ballard, the witness was informed that Lillard did confess judgment, and that an execution had issued, under which the bank stock was sold by the sheriff of Concordia for the sum of $2200, but the bank had never received any of the money. On the order of the sheriff of Concordia, the bank stock was delivered to Ballard. The witness never gave, nor did he agree to give any time whatever to Lillard. The memorandum was given at his request to enable him to carry out his own arrangement. The witness had no authority, by resolution of the board of directors or otherwise, to make this arrangement, but was in the habit of making such

Digitized by Google

arrangements on consultation with some of the directors. The deposit of the bank stock as collateral security, occurred after the maturity of all of Lillard's liabilities, and the bank never relinquished the right to sue on the notes at any time.

At the request of the counsel for the bank, the court charged the jury that the agent or cashier had no authority to bind the bank by any contract that would release parties from their notes. 2. To release an indorser, the engagement must be upon a good consideration, and binding, and one that will suspend the remedy. 3. That unless the judgment in Louisiana bound all of Lillard's property, and the contract was ratified by the plaintiffs, the law is for them.

The kind of contract with the principal which will discharge the surety, is well defined and settled. The effect of giving time to the principal in a forthcoming bond, was considered by this court in the case of *Newell & Peirce* v. *Hamer*, 4 How. 684. It was decided, that a mere voluntary engagement to indulge the principal debtor, would not discharge the surety. There must be a positive and binding agreement, based upon some new and valuable consideration, which is sufficient to tie up the creditor, and prevent him from asserting any remedy, during the time for which the indulgence has been given. The same rule was holden to apply to indorsers of promissory notes. *Wade* v. *Buckner, Stanton & Co.*, 5 How. 631. In this last case, a bill of exchange had been taken, payable at twelve months, and a receipt given expressing that the note was to be credited with the proceeds of the bill; and this was decided to be insufficient to discharge the indorser. See also *McLemore* v. *Powell*, 12 Wheat. 554.

Was there any such contract in this case? The evidence seems to fall far short of establishing any contract whatever that was binding on the plaintiffs below for one moment, even assuming that Henderson was authorized to do all that he did do. Lillard states that he executed a note, but he does not state that he did so by request, or with the knowledge of the bank, or that it was ever delivered. His testimony is unsatisfactory. He omits to state anything of the transaction which led to the

Digitized by Google

making of the note. He merely says that he made such a note; and that it was then in judgment in Louisiana. Henderson states the transaction in such a manner as to make it intelligible. It was a mere unexecuted promise to contract, on the performance of certain conditions. There was nothing in it binding. Lillard had promised to do certain things, and Henderson promised if they were done in a particular manner, he would deliver up the notes of Lillard. Lillard defeated the proposed settlement by selling his property. There was no consideration for this agreement; nor was there in fact any agreement to give time. Lillard does not state that there was, and Henderson states positively that there was not. Try this by the true test. Was there any period of time at which the bank was not at liberty to sue? There was not. When the proposed arrangement was spoken of, nothing was said about his giving a new note, and if by so doing his indorsers were discharged, then every indorser may be discharged in the same way. Lillard seems to have been the only actor in the matter. Even the money raised by the execution was never received by the bank.

But it is insisted that even if the indorsers are not discharged, still they are entitled to a credit for such an amount on account of the stock sold, as the amount of sale bears to the whole sum for which it was pledged as collateral security. If the bank had received the proceeds of sale, or if it had appropriated the collateral security, so much of the debt for which it was pledged would be extinguished; but the bank received nothing. The sale seems to have been brought about by Lillard exclusively. The bank took no step in the matter. The stock was given up under a mistaken notion of the rights of the parties. If the sale was valid, then unquestionably the delivery was proper; if it was invalid, then no title to the stock was acquired by Ballard, and the right is where it was before. The principle involved is, that a creditor who takes a collateral security for his debt, is bound to hold it impartially and justly, inasmuch as a surety who pays the debt, is entitled to be substituted to the rights of the creditor in using the security for his protection. In

Digitized by Google

such cases, if the security is lost by the negligence, or improper conduct of the creditor, the surety may bar the creditor of so much of his demand as he might have received from the security. *Hayes* v. *Ward*, 4 Johns. C. R. 123. This seems to be a matter of equity cognizance. The case from 3 Paige, 650, cited by counsel, decides that the whole of this doctrine depends upon the equitable principle that the creditor shall do no act to the injury of the surety. In the case cited from 1 Nott & McCord, the principle is adverted to, and it was said if the holder accept a deposit as security, and part with it without the consent of the indorser, he forfeits his claim upon the indorser; but the case before the court was not one of that description, and the doctrine, to its full extent, was not discussed. It is very difficult to apply this doctrine in the present case for several reasons. No act of bad faith is shown, nor is the security lost to the indorsers. Either the title to the stock is not changed by the sale in Louisiana; or if it is changed, the proceeds of sale are still within their reach if they should pay the debt. The bank seems to have disclaimed any interest in the judgment, and, under the circumstances, has an undoubted right to do so. But if it should be a valid judgment, then the sureties or indorsers may be entitled to all the benefits it can secure. The principle can only apply where the benefit of the security is lost to the indorsers by the improper conduct of the holder, and we cannot feel warranted, in this instance, in saying that it has been lost. If the indorsers relied on the execution sale as a satisfaction of so much of the debt, they should have pleaded it as a payment of so much.

But it is also said, that the court erred in charging the jury that the agent or cashier has no authority to bind the bank by any contract that would release parties from their notes. In the case of *The State* v. *The Commercial Bank of Manchester*, decided at the present term, we had occasion to inquire how far the acts of the cashier are binding on the bank, and have nothing to add. The court, however, at the request of the counsel for the defendants below, charged the jury that if they believed the cashier acted in the premises on consultation with

Digitized by Google

two or more of the directors, his acts are binding on the bank. This last charge is a modification of the first, and it was so framed as to meet fully the evidence given in. Henderson testified, that after consulting with one or two of the directors, he agreed with Lillard, that when the judgment should be confessed so as to bind all his property, his paper should be given up. On the evidence the charge could not have been given in terms more favorable to the defendants. It is evident the verdict was not predicated on a want of power in Henderson to bind the bank, but on the total absence of any binding contract. This is the more manifest from the several other charges given at the request of defendants below, which could not, under the evidence, have been more favorable to their cause. The court gave every charge they requested, and still the jury found against them, and could not, as we think, have found differently.

The judgment must be affirmed.

Digitized by Google

STEPHEN HARMAN *vs.* GEORGE B. SANDERSON.

It is a general rule, that in an action for the price of a chattel, the vendee may prove in defence deceit on the part of the vendor, and that the article is of no value; or he may show a partial unsoundness in mitigation of damages.

A purchaser cannot, by his own act alone, return and revest the property in the seller, and recover the price when paid, on the ground of a total failure of consideration, nor, by the same means, protect himself from the payment of the price on the same ground.

In an action for the price of a chattel, proof that the representations of the seller at the time of the sale were fraudulent, and the article of no value, will alone warrant a verdict for the defendant; however far the evidence may extend in mitigation of damages.

IN error from the circuit court of Monroe county, Hon. Stephen Adams, judge.

This was an action of assumpsit, founded on the promissory note of the defendant. The declaration was in the usual form, and the defendant pleaded non assumpsit. On the trial the plaintiff read to the jury the note sued on, and rested his case. The defendant then introduced as a witness one Sparks, who testified, that the note sued on was given for a cotton-spinning machine which he, as the agent of the plaintiff, sold to the defendant, that at the time of the sale he told the defendant the machine was a good one, and would run lighter than Pierce's machines, and with careful management and being kept in repair, would last eight or ten years. Witness further testified that at the time of sale the machine was a good one; but that after the commencement of this suit he heard it was out of order, and he went to the house of the defendant, and that the brother of the defendant, the defendant being absent, refused to let him see it. Several other witnesses were examined on behalf of the defendant, who proved in substance that the machine was inferior to the machines of Pierce; that it would sometimes spin

Digitized by Google

coarse and fine thread at the same time, and was worthless for the purposes for which it was purchased. The jury returned a verdict in favor of the defendant. The plaintiff then entered a motion for a new trial, which was overruled by the court, and the plaintiff removed the case to this court by writ of error.

William Yerger, for plaintiff in error.

It was not competent for the defendant to defeat a recovery on the note, without he returned or offered to return the machine. 3 Esp. N. C. 83; 5 East, 452; 4 Mass. R. 502; 7 Johns. 324. See also Chitt. on Bills, 89, 8th Am. ed. and cases cited in note, where this rule is clearly laid down, and also that a partial failure of consideration, where it is unliquidated, cannot be used as a defence to an action on a note.

Mr. Justice THACHER delivered the opinion of the court.

The plaintiff in error instituted an action in the circuit court of Monroe county, upon defendant's promissory note. The defendant pleaded non assumpsit; and, in order to show a failure of consideration, proved that the note, upon which the action was instituted, was given to secure the purchase-money of a cotton-spinning machine, which, at the time of the sale, was represented by the plaintiff's agent, of whom it was purchased, that it would run lighter than Pierce's machines, and with careful management, would last for eight or ten years. It was also proved, that the machine was worthless for the purposes for which it was purchased. On the other hand, the plaintiff proved that the machine was a good one at the time of its sale. A verdict and judgment were rendered for the defendant, whereupon a motion for a new trial was made and overruled.

It is a general rule, that in an action for the price of a chattel, the vendee may prove in defence, deceit on the part of the vendor, and that the article is of no value; or, he may show a partial unsoundness in mitigation of damages. *Beecker* v. *Vrooman*, 13 Johns. 302; *Sill* v. *Rood*, 15 Ibid. 230. The rule that allows the breach of the warranty to be given in evidence, in mitigation of damages, arises from the desire to avoid circuity

Digitized by Google

of action. *Street* v. *Blay*, 2 Barn. and Adol. 456; *Cary* v. *Gruman*, 4 Hill, 625. It is also a general rule that a purchaser cannot, by his own act alone, return and revest the property in the seller, and recover the price when paid, on the ground of a total failure of consideration, nor, by the same means, protect himself from the payment of the price on the same ground. *Towers* v. *Barret*, 1 T. R. 133; *Payne* v. *Whale*, 7 East, 274; *Street* v. *Blay*, 2 Barn. and Adol. 456. If the article is of any value, its retention by the vendee is his acknowledgment to the vendor of his liability to him to that extent. In the present case, the record does not show that the representations at the time of the sale were fraudulent and the machine of no value, which alone could have warranted a verdict for the defendant, however far the evidence might have extended in mitigation of damages.

Judgment reversed and new trial granted.

Digitized by Google

William Hemphill *vs.* The Bank of Alabama.

He who signs a bill or note in blank and delivers it to another, makes that person his agent, and authorizes him to fill it up with an indefinite amount.

But if such agent be limited in his authority, and fill up the note with an amount exceeding his limit, the note will, in the hands of a person who has received it with a knowledge that the authority was limited, be void as to the excess.

A defendant cannot, under the plea of non assumpsit merely, avail himself of the defence that the note on which he is sued has been changed from the note the execution of which he authorized; such defence is admissible only when the pleadings are under oath.

Whether an action can be maintained in the courts of Mississippi by the bearer on a note payable to bearer; which note was made in the state of Alabama where a statute provides that no one can maintain an action as the bearer of a promissory note? *Query?*

Where a defence is based upon the provisions of a statute of another state, in order to make the defence available, the statute must be produced and proved.

By pleading to the merits, the defendant waives any objection that may exist as to the character in which the plaintiff has brought the suit.

In error from the circuit court of Lowndes county, Hon. Hendley S. Bennett, judge.

The President, Directors and Company of the Bank of Alabama sued William Hemphill on the following note, namely:

September 30, 1837, *Marengo county, Ala.*

Twenty-four months after date, we John M. C. Walker as principal, Wm. Hemphill, and Ivey Smith as securities jointly and severally promise to pay Andrew Armstrong, Esq. Cashier or bearer, four hundred and forty $\frac{89}{100}$ dollars, for value received, negotiable and payable at the Branch Bank of the State of Alabama at Mobile.

John M. C. Walker,
Wm. Hemphill,
Ivey Smith.

Digitized by Google

In the declaration the plaintiffs averred that Armstrong had assigned and delivered the note to them, and that they were the lawful holders and bearers.

The defendant plead non assumpsit; when a trial was had and a verdict rendered for the plaintiffs. The defendant moved, in arrest of judgment, because the plaintiffs could not maintain the action; which being overruled the defendant moved for a new trial; and that motion also being refused, he embodied the testimony in a bill of exceptions.

From that it appears that all the testimony before the jury besides the note sued on, was the following statement by William Garrett, admitted by consent, as evidence.

"Sometime in the summer of 1837, John M. C. Walker, then and from that to the present time residing in Green county Alabama, was applied to for his name to be used by and for the benefit of Prince & Garrett at the Branch of the Bank of the State of Alabama, at Mobile. On such application Walker gave me his name in blank on three several pieces of paper, or in three several places on the same sheet, leaving space for the purpose of writing above his name three notes. I then procured William Hemphill, the defendant in this suit, and Ivey Smith, to sign the three blanks obtained from Walker, both of whom then resided in Green county, Alabama, where Hemphill, the defendant, continued to reside until December, 1840. One of the blanks above described, according to my best recollection and belief, was discounted by the said Branch Bank, in the fall of 1837, for six hundred dollars, or thereabouts, and the proceeds passed to the credit of Prince & Garrett, at said Branch Bank, of which Mr. Prince, one of the partners of the firm of Prince & Garrett was at the time a director.

"It was supposed that the note discounted for six hundred dollars and many others discounted by the bank about the same time and in the same manner, could not by law be collected under the relief or extension law, as it is usually called, passed by the legislature of Alabama, at the special session in June, 1837, which required that the discount should be made on three several notes to be due in one, two, and three years. Consequently

Digitized by Google

the remaining two blanks above alluded to, were placed in the bank and there filled up by one of the clerks of the same, for an amount which, when the interest was deducted and the proceeds placed to the credit of Prince & Garrett, would enable them to check out the six hundred dollar note, formerly, and as it was believed, irregularly discounted. One of the two blanks, last alluded to, was filled up for two hundred and twenty dollars, or thereabouts, and made to fall due about a year before the maturity of the note sued on in this case, for four hundred and forty $\frac{89}{100}$ dollars, which I have examined, and believe to be one of the blanks obtained from Walker as before stated.

"After the discount for the six hundred dollars was obtained and Walker advised of it, he demanded that Prince & Garrett should pay the money over to him, which they did. At the time I procured the blanks from Walker I promised him to protect and pay them at maturity provided they or any one of them should be used for the benefit of Prince & Garrett. At the time the notes were discounted Walker was generally believed to be good for a much larger sum than six hundred dollars, and so continued to be regarded until about the first of the year 1842; he is now insolvent. I know of no understanding between Walker and Hemphill, (the defendant,) that either of the blanks above alluded to was to be used for Walker's benefit, but believe that both Hemphill and Smith signed the blanks for the purpose and with the view of benefiting Prince & Garrett; when Walker claimed and received the benefit of the use of his blanks I considered my promise to protect them at an end especially as he was then and for a long time after the maturity of the paper, amply able to protect them himself, as was his duty to do. Hemphill signed the three blanks above alluded to, consenting that the same should be filled up and used at said Branch Bank for the use and benefit of Prince & Garrett.

WILLIAM GARRETT."

The defendant prosecutes this writ of errror.

Digitized by Google

Evans, for plaintiff in error.

1. Hemphill signed the blanks as surety for Prince & Garrett; they were for their use; their agency and power were limited; they applied them to a different use and made Hemphill, instead of their surety, become the surety of Walker. This transcended their authority and does not bind Hemphill.

2. From Garrett's testimony it is manifest the discount in the bank was really for the benefit of Walker, who obtained the money thus procured from Prince & Garrett. This was a fraud on Hemphill; and the bank became a party to it and is affected by it, as her discount of the first note was illegal and void. And that being the case the discount of the other two being to take up a void note, would itself be void and import no liability on the makers of the notes; and was beyond the authority, express or implied, given by Hemphill. An illegal act can never be cured by matter *ex post facto*.

3. Under the statute of Alabama, passed 30th June, 1837, no obligation nor liability against Hemphill in favor of plaintiff could arise from the note sued on. The bank is set forth in the declaration as bearers of the note sued on; as assignees by delivery of Andrew Armstrong. The words of the statute are "that from and after the 1st July, 1837, all bonds, bills, or notes which shall be made payable to any person or persons, or bearer, or to any corporation or bearer, shall have the effect of creating an obligation or liability in favor of the corporation, or person or persons only to whom any such bond, or note may be expressly made payable, and no one but such corporation or such person or persons or their *indorsers*, or personal representatives shall have a right to maintain in his own name an action on any such bond, bill, or note." See a decision of the supreme court of Alabama, under this statute, which is decisive of the case under consideration. *Clark & Welborn* v. *Field & Morgan*, 1 Ala. Rep., new series, 468. It will be perceived that this statute operates on the *obligation, the liability*. It is analogous to our Miss. statute of 1840, which prohibits banks from transferring their bills receivable, notes, &c. &c. It prevents any cause of action from springing out of the assignment

Digitized by Google

in favor of the assignee. If no cause of action could spring out of a transfer in favor of the bearer in Alabama, none can be recognized in our courts.

There are variances between the note given in evidence and the note declared on, which I will pass over without comment.

Adam Y. Smith, for defendant in error.

1. Before Hemphill can avail himself of the defence, that Prince and Garrett transcended his authority to them, and that the note sued on is not his, he must plead that fact under oath, according to the act of 1824.

2. The facts in the case, even if the pleadings had authorized the defence attempted, do not sustain it. It is apparent, from Garrett's testimony, that the blanks were used for the benefit of Prince & Garrett, for whose use they were intended.

3. Even had the blanks been used for a different purpose from that designed by the sureties, a *bona fide* holder, for a valuable consideration, without any notice of that fact, would be entitled to recover on them. 17 Johns. R. 176; 1 Bos. & Pull. 648; 4 Cow. 567.

4. That Prince was a director in the bank at the time, even if he was aware of the terms and conditions on which the blanks were given, which nowhere appears, would not operate as notice to the bank. The knowledge of one director, not disclosed, is not the knowledge of the bank.

5. It is contended that a statute of Alabama prohibits the suit in the name of bearer; that point was not made below; and it is a sufficient answer to it to state that if there be such a statute, it was not produced and proved on the trial.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of assumpsit brought by the bank, as bearer of a promissory note against Hemphill, as indorser. There were not regular indorsements from the payee to the holder. The plea was non assumpsit, not supported by affidavit. There was a verdict and judgment for the plaintiff below. A new trial was asked for and refused, to which a bill of

Digitized by Google

exceptions was filed, embodying the testimony, and the cause brought by writ of error to this court.

The defence attempted to be set up on this part of the case, is, that the note was indorsed in blank, and was afterwards filled up, and used for a purpose different from that which was intended. The law in regard to such defence is settled by this court in *Johnson* v. *Blasdale et al.* 1 S. & M. 17. But it is insisted that the defendant has not placed himself by his plea in a situation in which he can resort to this defence, because he has not denied the execution of the instrument by plea under oath, as required by the statute. This is unquestionably true. In *Green* v. *Robinson*, 3 How. 121, it was decided that by pleading in chief, the defendants admitted the execution of the note.

It is further urged by the plaintiff in error, that by a statute of Alabama, in which state this note was executed, no one can maintain an action as the bearer of a promissory note. See *Clark et al.* v. *Field et al.* 1 Ala. R., new series, 468; and that the same consequence attaches to it here. If this question were properly made, it would present a point of much nicety and difficulty.

Two writers in the American Jurist take opposite sides of this point, and discuss it with ability. Vol. 9, p. 42; vol. 11, p. 101. Frequent cases of kindred character have arisen in the English courts. In one of the most recent, *Trimbrey* v. *Vignier*, 1 Bing. 162; 27 En. Com. Law, 340, the rule is thus stated: "The interpretation of the contract must be governed by the law of the country, where the contract is made—the mode of suing, and the time within which suit must be brought, must be governed by the law of the country where the action is brought." "The question, therefore, is, whether the law of France, by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit; for, in the former case it must be adopted by our courts, in the latter it may be altogether disregarded, and the suit commenced in the name of the present plaintiff." "We

Digitized by Google

think the French law on the point above-mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing."

The supreme court of the United States, in a case decided about the same time, laid down the rule differently. They say, "an instrument may be negotiable in one state, which may yet be incapable of negotiability by the laws of another; and the remedy must be in the courts of the latter on such instruments, according to its own laws." *Bank of the United States* v. *Donnally*, 8 Peters, 372.

The decisions in the state courts seem not to harmonize. Judge Story, in his Conflict of Laws, (p. 222 – 474, second edition,) collects the cases, but makes no effort to reconcile them.

But we are not bound to decide the point from the shape in which it is presented, and we therefore leave it open. The statute of Alabama was not produced and proven in the court below, and the objection is now made that we cannot notice it without such proof. This objection is valid. *Martin, Aiken et al.* v. *Martin, Pleasants & Co.* 1 S. & M. 177.

We think, also, that by pleading to the merits of the action, without calling in question the character in which the party brought the suit, the objection, if any, is waived. *Lanin et al.* v. *Trigg et al.* H. & H. 595, decided by this court. This would not exclude proof that in truth the holder was not the owner of the note.

The judgment is affirmed.

Digitized by Google

ALBERT G. BROWN, Governor of the State, for the use of Robert Josselyn et al. *vs.* CLAIBORNE M. PHIPPS et al.

The sureties on a tax collector's bond are not liable to the publishers of a newspaper, for the payment of the cost of advertising the sales of property by the tax collector, for taxes, in such paper; notwithstanding the law makes it his duty to advertise his sales in a newspaper.

Tax collectors' bonds, the conditions of which are to collect and pay into the county and state treasury, all the state and county taxes, and to do and perform all the other duties which pertain to their office, are not a security for any services rendered to the collector by individuals, but are securities for the state and county only.

IN error from the Lafayette circuit court; Hon. James M. Howrey, judge.

The declaration in this case was in these words:

"Albert G. Brown, governor of the state of Mississippi, and successor in office of A. G. McNutt, who sues for the use and benefit of Robert Josselyn and William Lewis, late partners in business under the firm and style of Josselyn and Lewis, by attorneys complain of James Stockard and Claiborne M. Phipps, of a plea that they render unto them the sum of five thousand dollars, which to them they owe, and from them unjustly detain; for that whereas one James T. Stockard, who is now dead, heretofore, to wit, on the 10th day of November, A. D. 1841, at the county aforesaid, made and executed their certain writing obligatory [here the declaration recites the bond], with the following conditions: 'The condition of the above obligation is such, that whereas the above-named James T. Stockard has been duly elected tax collector for the county of Lafayette, by the qualified electors of said county, at an election begun and held on the first and second days of November, in the year 1841, and has been duly commissioned by the governor of the state of Mississippi, tax collector for the county of Lafayette, for the term prescribed by law; now therefore if the said James

Digitized by Google

T. Stockard, will well and truly faithfully collect and safely keep, until bound by law to pay the same over, all the taxes assessed in his county for state and county purposes; that he will pay into the treasury of the state and county the sums of money collected by him to which said treasuries shall be respectively entitled, according to the regulations of law, and that he will in all things truly and faithfully execute and perform the duty of tax collector for the county, to the best of his skill and ability so long as he shall continue in office;' now, said plaintiffs in fact say, that the said James T. Stockard did not, in all things, truly and faithfully execute and perform the duties of tax collector for the county, to the best of his skill and ability, but has broken said condition in this, that the said James T. Stockard, as tax collector, and by virtue of said office of collector for said county of Lafayette, did in December, 1842, employ said plaintiffs to make, in a newspaper called the Guard, of which they then were proprietors and conductors, publication of the sales of four hundred and seventy-six lots and parcels of land, lying in said county of Lafayette, and state of Mississippi, to satisfy the state and county tax due thereon for the year 1842, for which services by said plaintiffs so rendered, he the said James T. Stockard, as collector as aforesaid, became liable by virtue of his said office; and bound himself as collector of taxes as aforesaid, to pay said plaintiffs the sum of fourteen hundred and forty dollars, which said sum of money the said services were reasonably worth," &c.

There were other breaches to the same effect assigned, differing only in phraseology.

The defendants demurred specially, and set out five causes, in substance that the tax collector's bond was a statutory bond, and could only be placed in suit in the cases pointed out by the statute, which affected the state and county taxes only.

The court below sustained the demurrer, and the plaintiffs prosecuted a writ of error.

D. C. Glenn, for plaintiffs in error.

Every allegation or averment necessary to sustain the action

Digitized by Google

is fully set forth in the declaration, the truth of all which is confessed by the demurrer. The only question is a purely legal one, as to the liability of the sureties of the collector upon his official bond, for a contract made by him for advertising the sale of lands upon which taxes were due the state. Upon the point I have been able to find no authorities; but common sense, which is said to be common law, would say that they were. There are taxes due the state. The state has provided its officer to collect the same, and pointed out the mode by which payment shall be enforced in cases where there are failures. In cases of delinquent tax-payers, it has required its officer to advertise the same in a newspaper. The officer gives his bond to do his duty; if he fails to advertise, he is liable on his bond; if he advertises, the state contemplated he should pay the costs of so doing; if he fails to pay, it is a breach of his bond, for the state certainly intended the printer should be paid when it ordered him to have the work done. He is clearly not liable individually for complying with the requisition of the state. If he is not liable officially, he is not liable at all, and the printer gets no pay. This would be gross injustice, and involves the charge of bad faith on the part of the state. The intention of the legislature was, that the collector should pay the costs of advertising from the proceeds of the sales, and if he failed to do so, he is as much liable upon his official bond as if he had failed to pay over to the state other moneys received by him.

Barton and *Taliaferro*, for defendants in error, contended that the defendants were only liable for the collection, safe-keeping, and disbursing of the revenue. See section 27 of "the act to provide for the revenue of the state," passed Feb. 6, 1841. Their bond could only be sued on for any breach affecting the moneys of the state or county.

Per Curiam. The defendants were the sureties of James T. Stockard, deceased, in his official bond as tax collector of Lafayette county; the plaintiffs were the publishers of a newspaper, and had inserted in their paper the tax collector's advertise-

Digitized by Google

ments of sales for taxes, to an amount exceeding seven hundred dollars. This suit was brought on the official bond, in the name of the governor for the use of the publishers, to recover the amount of the bill for advertising. The defendants demurred to the declaration, which the court sustained. The causes of demurrer go directly to the right to sue on the official bond for a failure to pay such a demand as this.

It is now insisted that the judgment on the demurrer was wrong, because, as the law, as it then stood, required the collector to advertise in a newspaper, it was part of his official duty to advertise, and of course to pay the printer. The condition of a collector's bond is, that he shall well and truly collect and pay into the treasury of the state or county treasury, all the state and county taxes which shall be collected by him, according to law, and shall do and perform all other duties which pertain to his said office, &c. This condition covers nothing more than such duties as the statute prescribes. The law requires the collector to give notice of his sales in the nearest newspaper, but it makes no provision for paying for such advertisements. That is a matter between the collector and the publisher. It seems that the collector is authorized to sell a sufficient amount of property to pay the taxes and all the costs incident to the sale; that is, all that he may have expended in making the sale, but the bond is not a security for any services rendered to the collector by individuals. It is a security to the state and county only, and the sureties have a right to stand upon the strict terms of their contract. The demurrer was therefore properly sustained, and the judgment must be affirmed.

Digitized by Google

WILLIAM S. PARHAM *vs.* THOMAS HARNEY.

Where a jury, in the trial of an action for assault and battery, after having retired to make up their verdict agreed, immediately upon entering into the jury room, that each should put down a sum which should be divided by twelve, and that the result should give the amount of damages to be found by their verdict; and this agreement was carried out and acted on; *held* that the verdict so found was irregular, and should be set aside.

Whether the affidavits of jurors to establish the conduct of the jury while in the jury room are admissible, on a motion for a new trial? *Query.*

IN error from the circuit court of Hinds county, Hon. Morgan L. Fitch, presiding judge.

Thomas Harney brought his action for assault and battery against William S. Parham, founded on the alleged battery and mutilation of the person and left hand of the plaintiff by the defendant, on the 11th day of June, 1838; the damages were laid at twenty-five thousand dollars.

The defendant pleaded not guilty, and *son assault demesne;* on the first of which the plaintiff took issue, and to the second replied that the defendant committed the trespass in his own wrong. Afterwards the plaintiff had leave to withdraw his replications, and replied to the second plea, that the defendant had used more force and violence than was requisite to repel the plaintiff's assault; this plea concluded with a verification; to which no issue was tendered by the defendant.

At the June term, 1842, a trial was had, which resulted in a verdict for the plaintiff, for $3,602 50. The defendant moved for a new trial, which was refused. On the trial of the motion, the defendant offered certain affidavits, from which the following facts appear:

J. W. Dougherty, a deputy sheriff, made oath that after the jury retired to their room, it was proposed by one of the jury,

Digitized by Google

F. H. Robinson, that each juror should put down in figures the amount of the damages that he thought the plaintiff entitled to, to be placed in a hat and drawn out; and that the aggregate amount should be divided by twelve; that this proposition was made and agreed to before the jurors had stated to each other the amount of damages which the jurors respectively thought the plaintiff entitled to; that the jurors proceeded and placed in the hat their several amounts, and when drawn out, there were four tickets for $300 each; one for $30; one for $10,000; and he thinks one for $20,000; that each juror acted separately from the others in making out his ticket with the amount of damages thereon. There were three deputies in the room with the jury. Immediately after going up to the jury room and before all of the jurors had got up stairs, one of the jurors asked for some water, and the witness immediately retired to the court room and took a pitcher of water to the jury, and when he arrived there he heard the proposition made by Robinson; that it was acted upon, and the sum thus obtained was the same as the verdict of the jury.

I. B. Fairchild, also a deputy sheriff, testified in substance the same with Dougherty, with this addition; that he saw no paper read by the jury; heard one of them remark that it was the only mode in which the jury could come to a conclusion; that the computation and verdict were made out on a bench standing at the door of the jury room, and some of the jurors holding their hats before a window that was broken, to keep the candle from being blown out, and the others standing about, some out of, and others in the room.

Patrick Magee proved that Robinson wrote out the verdict of the jury.

L. B. Seaton, a deputy sheriff, proved that, about an hour after the jury had rendered their verdict, he went into the room which the jury had occupied when they made out their verdict, and he found upon a bench, about three feet from the door of the jury room, outside of the room, twelve pieces of paper, with amounts in figures upon them; one with $10,000; one of $5000; one or two of $2000; one of $1000; four of $500

Digitized by Google

each; one of $800, or $850; one of $750, or $700; and one of $30, or $36.

The defendant also offered the affidavits of two of the jury who tried the cause; and which, in substance, established the same facts that the other witnesses deposed to. The introduction of these various affidavits, on the motion for a new trial, was objected to by the plaintiff, and the objection sustained by the court, to which exceptions were taken.

The errors assigned were: 1. The permission of the court below to file a new replication, and withdraw the old.

2. The refusal to grant a new trial.

3. The jury were sworn to try the issue joined, when there was no issue joined.

4. If there was an issue the verdict should have been set aside, as not responsive to that issue.

5. The court erred in rejecting the affidavits of the jurors.

[The arguments of counsel on the assignments of error not passed upon by the court, are omitted.]

Mayes and *Clifton*, for plaintiffs in error.

1. The court erred in not granting the new trial, on the affidavits of Dougherty, Fairchild, Magee, and Seaton.

If the jury agree that each shall put down a sum and divide the aggregate by twelve, the quotient to be the verdict, it shall be set aside. *Smith* v. *Chetham*, 3 Caines, 53; *Harvey* v. *Richett*, 15 John. R. 87; *Roberts* v. *Fails*, 1 Cowen, 238; *Warner* v. *Robinson*, 1 Root, 194: *Ellege* v. *Todd*, 1 Humph. R. 44; *Bennett* v. *Baker*, Ibid. 399.

If, however, after each of the jurors has conscientiously declared his amount of damages, they agree that the sums shall be added, and divided by twelve, as the average of their opinions, it will not be cause to set aside the verdict. *Dana* v. *Tucker*, 4 Johns. R. 482; *Grinnell* v. *Phillips*, 1 Mass. R. 541; *Shobe* v. *Bell*, 1 Rand. 39; *Cowperthwait* v. *Jones*, 2 Dallas, 55. The case at bar does not come within this distinction. And it also plainly appears that some one of the jury, at least, acted fraudulently by putting down $10,000, and also from the evi-

Digitized by Google

dence of Seaton, there can be no doubt but that the sum thus improperly produced was doubled by the juror who made the calculation, and the jurors thereby were deluded into a verdict for double the amount produced by the mode improperly agreed on.

2. The court erred in rejecting the affidavits of the jurors. The ancient law and practice were to receive the affidavits of jurors. As late as the 8th of George II., in *Phillips* v. *Fowler*, 1 Barnes, 441, the affidavits of the jurors were received as of course. In *Parr* v. *Seames*, 1 Barnes, 438, judgment was stayed to allow the affidavit of jurors. In *Aylett* v. *Jewell*, 2 W. Black. 1299, it was taken for granted, that the jurors' affidavit should be produced. In *Smith* v. *Chetham*, 3 Caines, 57, Spencer, J. says: "On examining the English authorities prior to the revolution, it appears to me that the information of jurors as to what passed, may be received. The only decision to the contrary, is in Keble, (*Price* v. *Powers*, 1 Keb. 811,) but it is a very unintelligible and illy reported case. The determinations in Bunberry and Barnes, (*Bellish* v. *Arnold*, Bunb. 51, and *Phillips* v. *Fowler*, Barnes, 441,) show that the information of jurors may be received, and I cannot see any principle of law invaded by it."

The rule of law as it existed in England prior to the revolution, has been adopted, and yet prevails in several of the states.

In *Warner* v. *Robinson*, 4 Root, 194, the affidavits of jurors were received. So in *Grinnell* v. *Phillips*, 1 Mass. R. 541. So also in *Shobe* v. *Bell*, 1 Rand. 39. The point was expressly made in *Elledge* v. *Todd*. 1 Humph. 44, and decided that the jurors' affidavit was admissible.

That this was the settled law of England up to the Revolution, cannot be controverted. That no statute has changed it we all know. It however seems now to be settled in England, and in many of the States of this confederacy, that such affidavits shall not be admitted. How has this change been produced?

The foundation of the overthrow of this ancient rule seems to be the opinion, or rather the legislation of Lord Mansfield, in *Vaise* v. *Delaval*, 1 Term Reports 11, which has been adopt-

Digitized by Google

ed and followed by many of the States. Lord Mansfield and the American courts who have followed him, proceed upon what they conceive to be the impolicy of admitting such evidence. Now what is or is not sound policy, is a question for the legislature, not for the judiciary. And the ancient law having been settled, and up to the Revolution held to admit the affidavits of jurors, the changing of this rule by the courts was clearly an act of usurpation. The line between the legislative and judicial power should be clearly defined and constantly kept in view, to guard against that dangerous uncertainty that ever must arise from the invasion of the office of legislation by the judiciary. Let it not be forgotten that we adopted the common law of England, and never did adopt the opinions or resolutions of Lord Mansfield or of any of the courts of the States of this Union, where they are plainly against that law as settled and held before and up to our separation from England.

But if the courts will, upon their views of policy, invade the province of the legislature, and instead of expounding and applying the law as it is, change or make law, still the apprehended evils which led to this judge-made law as it is now held in England and many of the States, do not apply to this case. Whatever evils we may apprehend from receiving the affidavits of jurors to impeach their verdicts when they stand alone, these evils cannot arise when the affidavits of jurors are produced merely to corroborate and support the affidavits of other witnesses, as in the present case.

Harney, in proper person.

1. On the question as to the refusal to grant a new trial on the ground of misbehavior on the part of the jury, cited the following authorities: 4 Binney, 155; *Rex* v. *Almon*, 5 Burr. 2687; 15 Johns. 309; *Cogan* v. *Eledon*, 1 Burr. 383; *Smith* v. *Cheatham*, 3 Caines, 61; *Copperthwait* v. *Jones*, 2 Dallas, 55; 3 Caines R. 57; *Executor of Breedon* v. *Breedon*, 1 Bos. & Pull. 329; *Cluggage* v. *Swan*, 4 Binn. 150; *Shobe* v. *Bell*, 1 Rand. 39; *Martha* v. *Bailey*, 1 Exch. R. 9.

2. On the question whether the affidavits of jurors, seeking

Digitized by Google

to impeach their verdicts, are admissible testimony, he cited the following authorities: *Friar* v. *The State*, 3 How. 422; *Rex* v. *Almon*, 5 Burr. 2687; *Vaise* v. *Delaval*, 1 Durnf. & East, 11; *Pierce, Executor* v. *Warren, Executor*, 1 H. & Munf. 385; *Cochran* v. *Street*, 1 Wash. 105; *Cluggage* v. *Swan*, 4 Binn. 150; *Martha* v. *Bailey*, 1 Exch. R. 9; *Jackson* v. *Dickenson*, 15 Johns. 309; *Crawford* v. *The State*, 2 Yerg. 60.

Mr. Justice CLAYTON delivered the opinion of the court.

The principal ground of error assigned in this cause, is, the misconduct of the jury, upon the trial, in the court below. Without consultation or deliberation about their verdict, they agreed, immediately upon entering their room, that each should put down a sum, which should be divided by twelve, and that the result should give the amount of damages to be found by their verdict. This rule was adopted, and acted on. The several amounts put down by the jurors ranged from thirty dollars to ten thousand dollars. This mode of making up a verdict has been repeatedly condemned by the courts of the country. 10 Wend. 595; 1 Humph. 43; 1 Cow. 238; 15 Johns. 87. It substitutes the fluctuating and uncertain hazards of a lottery, for the deliberate conclusions of their reflections, and interchange of views. Graham's Pr. 315.

This misconduct was established by the testimony of three witnesses, who were not of the jury; deputy sheriffs who saw the proceeding, and the tickets upon which the figures were written, placed in a hat, and drawn out, to form the basis of their finding. Such a course cannot meet with judicial sanction.

The judgment will be reversed, and a new trial awarded.

Digitized by Google

Smedes & Marshall
6s 61
92 414

SEABORN HARGROVE et al. *vs.* MARTIN, PLEASANTS & CO.

In a suit in chancery against both adult and infant defendants, a decree rendered in favor of the complainants against all the defendants upon *pro confesso* against the adult defendants, and the answer of guardians *ad litem* for the infants, without any proof, will be erroneous as to the infants, even though time be reserved in the decree to the infants, after they come of age, to show cause against it.

Taking a case for confessed in equity, entitles the complainant to a decree only against the party as to whom the bill has been taken for confessed; not against the others; and if the defendant against whom no *pro confesso* is taken, disprove the bill, the whole will be dismissed.

A *pro confesso* against an infant will not authorize a decree against him; there must be proof; and a reservation of a right to show cause against the decree, after the infant attains majority, does not cure the error.

Whether the reservation of a right in an infant to show cause against the decree after he attains majority, extends only to defects and errors in the decree itself, and is barred by a sale under the decree — *Quære.*

Where a decree has been rendered in the chancery courts in a suit against adults and infants on *pro confesso* against the former, without proof, and this court on that account reverse the decree, the *pro confesso* as to the adults will not thereby be set aside. The cause will proceed as if no decree had been pronounced.

IN error from the vice chancery court, held at Holly Springs, before Hon. Henry Dickinson, vice chancellor.

On the 18th day of January, 1837, Wilson T. Caruthers executed a deed of gift, conveying to W. Delia Fletcher Hargrove, Marquis Lafayette Hargrove, Martha Frances Hargrove, and Mary Jane Hargrove, children of Seaborn and Nancy Hargrove, a section of land lying in Marshall county, and designated as Section No. 10, Township 4, Range 2, west of the Basis Meridian of the Chickasaw cession. It is recited in this conveyance, that the parents of the grantees are to reside upon the land, and raise and educate their children, the grantees.

Digitized by Google

On the 28th of December, 1841, Martin Pleasants & Co. recovered judgment in the district court of the United States for the northern district of Mississippi, against Caruthers, for the sum of $7575 83 cents, damages and costs of suit; upon this judgment execution issued, and was returned *nulla bona*, and thereafter, on the 18th of February, 1844, Martin, Pleasants & Co. filed their bill, setting out these facts; and also averring that the debt on which their judgment was founded, was contracted before the deed of gift was executed; that at the time of making this deed, Caruthers was otherwise indebted to an amount exceeding all his means of payment; that in the year 1842, the complainants were taking measures for the institution of a suit in equity, for the purpose of having this deed of gift set aside as fraudulent, and that the grantees in the deed, confederating with one John T. Finley and others, with the fraudulent design of defeating this contemplated suit, permitted the section of land to be sold for taxes, when Finley became its purchaser at or about the sum of sixteen dollars; since which sale the family of the grantees has continued in the occupation of the land, as before, Finley holding the tax-collector's deed, for the benefit of the grantees; that on the 26th of December, 1843, the complainants caused a tender to be made to Finley of the sum of $17 36 cents, that being the amount of his bid for the land at the tax-collector's sale, with sixteen per cent. per annum thereon; and demanded from him a cancelment of the tax-collector's deed, which he held; but that Finley, although he well knew all of the circumstances of the case, refused to permit the redemption of the land; that complainants were yet willing to refund to Finley the amount paid by him for the land at the tax-collector's sale, with the interest allowed by law, together with any other moneys which Finley may have paid for taxes.

To this bill the grantees in the deed, who were infants, their father and mother, Caruthers and Finley, were made defendants; and by due service of process brought before the court.

J. C. Alderson was appointed guardian *ad litem* for the infant grantees, and filed the usual answer disclaiming all knowledge, and submitting their interests to the court.

Digitized by Google

The bill was taken for confessed as to all the other defendants. No proof at all was taken in the cause; and the case was submitted for final decree upon the bill, answer, and *pro confesso*. The chancellor decreed the deed of gift as against the judgment of the complainants to be voluntary, fraudulent and void, and that it should be delivered up to be cancelled; that the tax-collector's deed should also be cancelled; and that the infant defendants should be allowed a day to contest this decree until the expiration of six months after they should come of age, and a copy of it be served upon them.

From this decree the defendants below prosecute their writ of error.

Lucas, *Watson* and *Clapp*, for plaintiffs in error.

The defendants, under twenty-one years of age, by their guardian *ad litem* James C. Alderson, having answered the bill, without admitting or denying its allegations as against them, no decree could be properly rendered except upon a case made out by testimony. The doctrine is well settled, that though upon a motion to dissolve an injunction, the matters stated in the bill and not denied by the answer, must be taken as true; yet on the final hearing they must be proved or the plaintiff will fail. 4 Randolph, 451; 5 Leigh, 460, 467. In the case of *Young* v. *Grundy*, 6 Cranch, 51, the rule is stated by Chief Justice Marshall in these words. "If the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing." If an answer is deemed insufficient, from omitting to notice any material allegations in the bill, the plaintiff must except to it and call for a better answer. If his exceptions be sustained, and the defendant refuses to answer further, his bill may be taken *pro confesso* generally. *Coleman* v. *Lynes*, Ex., 4 Randolph, 456; *Jossling* v. *Stewart*, 4 Vesey, 619. Such is the settled law in the case of adult defendants; in this case the parties most affected by the decree, are infants, and as such entitled to even yet more favor.

The effect of an answer of an infant by his guardian *ad litem*, is to no other purpose than to make proper parties, so as to

Digitized by Google

have an opportunity to take depositions, to prove the matters in question, and therefore exceptions cannot be taken to an infant's answer. Bingham on Infancy, 133; Lubé's Equity Pleading, 69; Story's Equity Pleading, § 871. Nor can there be a valid decree against an infant by default, nor on his answer by his guardian, but the plaintiff must make out his case against an infant by proof. 3 Johnson's Chancery Rep. 367.

2. The *pro confesso* against the adult defendants should not be permitted to operate to the prejudice of the infant plaintiff in error. They are the only parties beneficially interested against the defendants in error; nor do they sustain, to their co-appellants, such a relation, that they can be affected by their default, admissions, or acts. Had each one of the appellants, against whom a *pro confesso* was taken, answered the bill, and on oath admitted all of its allegations, no foundation would thereby have been laid, for a decree against the infant appellants; and the *pro confesso* certainly does not present a stronger case against the infant appellants, than such answers and express admissions of their co-plaintiffs in error would have done. It is submitted that a *pro confesso* against one defendant, will not operate to the prejudice of a co-defendant, unless the relation between the parties is such, that an answer by the former would have been evidence against the latter. And had the plaintiffs in error, against whom the *pro confesso* was taken, answered, their answers would not have been evidence against the infants. To the general rule that the admission of one person cannot affect another, and that the answer of one defendant, is not evidence against a co-defendant, there are exceptions; but no one of these exceptions embraces this case. The law on this subject is stated by Chief Justice Sharkey, in delivering the opinion of the court in the case of *Montgomery* v. *Dillingham*, (3 S. & M. 647,) in these words: "In chancery proceedings it is true, as a general rule, that the answer of one defendant is not evidence against his co-defendant, though it is, like most general rules, subject to exceptions. It does not apply, when they are all partners in the same transaction, the partnership being otherwise proved. This rule applies

Digitized by Google

when a liability is to grow out of the answer; but where the joint liability is otherwise fixed, then there are many instances in which the answer of one defendant is evidence against another." The case under consideration does not involve a partnership transaction. Nor is a joint liability of the defendants, or any liability whatever on their part, otherwise proved, than by the *pro confesso*. The infant appellants held no joint interest with either one of their co-appellants; and there does not exist between them and their co-appellants, Seaborn and Nancy Hargrove, an identity of interest, which will make the admissions of, or the *pro confesso* taken against the latter, evidence against the former; — as a condition precedent to the right on the part of the appellees, to a decree, it was necessary that the deed of gift from Caruthers be shown to be fraudulent; and no admission of this fact by Finley, whether made *in pais*, or in more solemn form under oath in an answer, or by his default in not answering a bill in which the fact was charged, and a consequent *pro confesso* taken against him, could be used as evidence against the infant appellants. They are the parties against whom the alleged fraud is to be established, and against whom, when established, it is chiefly to operate; between them and Finley no such relation is shown or even alleged to exist, as makes the default, acts or admissions of the latter, evidence against the former; and it is not even proved by the exhibition of a copy, or in any other way, that Finley holds a deed for the land from the tax-collector, or from any other person, nor is it in any way whatever *proved*, that he had the slightest interest in said land; and that he does hold such a deed, or had any interest whatever in the land, certainly cannot be established as against third parties, by his own admission, or the *pro confesso* taken against him. To maintain the converse of this last proposition, would be to assert, that an individual is to be permitted, by his own admissions or acts, to make evidence which will be allowed to operate in his own favor, and to the prejudice of another.

The infant plaintiffs in error do hold a derivative title under Caruthers, against whom a *pro confesso* was also taken; but

Digitized by Google

this title is protected by the well-settled doctrine, that a title or interest cannot be affected by the admissions or acts of the party, from whom, or under whom, it was acquired, subsequently to the time of its having become vested. Upon this point the authorities are clear and numerous; and as it respects the grantor of real property, it is confidently asserted, that there has been no case decided, allowing his declarations to be given in evidence against a party, who had, previously to such declarations, acquired his title. Nor is this rule varied by the circumstance that the grantor is bound by a warranty, express or implied, to assure the title or interest in question. See this subject ably discussed in the opinions of Baldwin and Allen, in the case of *Petit* v. *Jennings*, 2 Robinson's Virginia Reports, 676. See pages 679, 680, 681, 697, 698, and the numerous authorities there cited. See also *Herricks* v. *Selzer*, 4 Howard, 506.

It does not necessarily follow that a decree is to be rendered against a party, as to whom a complainant's bill is taken as confessed. The circumstances of the case are to be regarded, and if a co-defendant answers, and disproves the bill, or if it appears that no decree can be rendered against the defendant in default, without affecting a co-defendant, against whom the plaintiff is entitled to no relief, the bill must be generally dismissed. In this case the defence of the appellants in default, does not rest on matters separate and distinct, and applying only to themselves; nor have they rights which can be reached by any decree, which would not virtually be a decree against the infant defendants also. If then the bill should have been dismissed as to the infant appellants, it should also have been dismissed as to their co-appellants. Were it otherwise, it would lead to this absurdity, that after dismissing the bill as to the infant appellants, a decree would be rendered in the cause, by which their rights would be materially affected and prejudiced. 4 Leigh, 579; 10 Johnson, 524; 2 Howard, 912.

If the foregoing views be correct, the bill should have been dismissed generally, and now this court must render the decree

Digitized by Google

which should have been rendered by the court below. How. and Hutch. 532, sec. 9.

Trotter and *Stearns*, for defendants in error.

In this cause, the defendants in error, who were the complainants below, took a decree upon the answer of the infant defendants, filed by their guardian *ad litem*, and *pro confesso* as to the other defendants.

So far as Hargrove himself is concerned, we conceive that the *pro confesso* against him estops him from questioning the correctness of the decree, if it be warranted by the allegations of the bill. The conveyance from Caruthers to the children of Hargrove, filed with the bill as Exhibit B, sets forth that it was the object of the grantor to provide a settlement of land upon which the parents of the grantees were to reside, and raise and educate them. This gave to Hargrove and his wife the right to the use and occupation of the land conveyed, until such time as their children should attain the age of majority. Therefore it was that we made them parties defendant. The decree operates, as to them, only upon their usufructuary interest in the land, and must be regarded as in the nature of a judgment by default, which is conclusive against their rights under the deed.

The infant defendants below answered by their guardian *ad litem*, in the usual form. The decree directs the service of a copy upon them after they shall become of age, and allows them six months, thereafter, in which to contest it.

It is objected that we furnished no proof in support of the allegations of our bill, and that, in consequence, a decree against the infant defendants was improper. We submit, however, that such proof was unnecessary. Had we made it, the decree would have bound the infants no further than they *are* bound by the decree we have taken. 3 Johns. Ch. R. 367; 4 Ibid. 302; 1 Am. Eq. Dig. tit. Infant, I, 61.

In equity, this should be considered as a bill filed against a tenant for years, in possession, and an infant remainder-man or reversioner. The tenant, who is the only party now to be

Digitized by Google

affected by our proceedings, suffers judgment to go by default, and his is the only interest acted on by the decree, as that of the infant reversioner, by the very terms of the decree, is unaffected by it, and remains *in statu quo*, and can only be made subject to the operation of the decree by his neglect to contest it within six months after service upon him of a copy. It is, as to him, but a decree *nisi*.

Mr. Justice CLAYTON delivered the opinion of the court.

The only question in this case relates to a point of chancery practice.

There were several defendants, some of whom were infants. The bill was taken for confessed, as to the adult defendants, but the infants answered by guardian *ad litem*. There was no proof in the cause, and a decree was rendered in favor of the complainants, reserving time to the infants, after they came of age, to show cause against it.

This was erroneous, as to the infants; the *pro confesso* as to the others, could have no effect upon their rights. Taking a case for confessed in equity, entitles the complainant to a decree only against such party, not against the others. 3 Johns. Ch. 367; 10 Johns. 537; 4 Leigh, 579; 2 Atk. 21. And if the defendant, against whom no *pro confesso* is taken, disprove the bill, the whole will be dismissed.

Even a *pro confesso* against an infant will not authorize a decree against him, there must be proof. *Mills* v. *Dennis*, 3 Johns. Ch. 367. The reservation of a right to show cause against the decree, after the infant attains majority, does not cure the error. That right is a limited one, and seems to extend only to defects and errors in the decree itself; and it seems also to be barred by a sale under the decree. 3 Johns. Ch. as above. Though in this we give no authoritative opinion.

For this error the decree will be reversed. But this does not extend to set aside the *pro confesso* as to the adults. The cause will stand as it did, when the decree was pronounced, and will proceed from that point, as if it had never been made, leaving it to the court below to set aside the *pro confesso* or

Digitized by Google

not, according to its legal discretion. See *Gwin* v. *Harris*, 1 S. & M. Ch. R. 528.

We regard the appeal in this cause as having been taken by the infants as well as the other parties.

Decree reversed.

Digitized by Google

14 70
70 339

THOMAS HUNDLEY *vs.* ROBERT H. BUCKNER, use of Levin R. Marshall.

Whether the certificate of the record of a deed, by a deputy of the probate clerk in his own name, and not in that of his principal, is a valid certificate of such record. *Quære?*

Where a deed was read without objection in the court below, the certificate of record of which was made by the deputy of the probate clerk, this court would not lend a willing ear to that objection, raised here for the first time.

Where a deed was offered in evidence, the certificate of the record of which was made and dated several years after the actual record of the deed, such certificate, unless there be evidence to disprove it, will be sufficient evidence of the proper record of the deed, to admit it as testimony.

The rule that if personal property be left in the possession of the vendor or grantor it is evidence of fraud, has no application to deeds of trust or mortgages duly recorded; it is confined to absolute sales; the recording of the mortgage is equivalent to an actual delivery of the property.

Where a trustee, to whom a slave has been conveyed as security for a debt, institute an action of detinue against a person not a party to the deed, for the recovery of such slave, the recital in the deed of trust, and the production of the note, to secure which the negro was conveyed, will be *prima facie* evidence of the *bona fides* of the debt thus secured.

Whether the sale of a slave, under a deed of trust, by which the slave was conveyed to a trustee to secure a debt due the *cestui que trust*, will be valid if made by the trustee while the slave is in the adverse possession of another, and not present at the sale. *Quære?*

Where personal property is sold not upon a credit, the purchaser cannot take the property or sue for it, without payment or tender of the purchase-money.

M. conveyed a slave to B. in trust to secure M. R. & Co. a debt; after the execution of this deed of trust, the slave conveyed by it was purchased under execution against M. by H. on a judgment junior to the deed of trust. B. the trustee, sold the slave while in the possession of H., and in the absence of the slave, under the deed of trust to L. R. M.; and thereupon B. instituted an action of detinue for the use of L. R. M. against H. to recover the slave; *held*, that the action of detinue could not be maintained in the name of one for the use of another, and that therefore the name of the usee in the record was wholly superfluous; an impertinent allegation, and should be disregarded.

Digitized by Google

In an action of detinue, the legal title alone is in controversy; if there be equities, they must be settled in some other mode.

It seems that where an objection is taken to the insertion of the name of an usee in the record, such objection should be made in the court below, where it might easily be remedied.

In error from the circuit court of Hinds county; Hon. M. L. Fitch, presiding judge.

Robert H. Buckner, who, as the declaration stated, sued for the use of Levin R. Marshall, instituted an action of detinue in the court below, on the 28th day of April, 1838, against Thomas Hundley, to recover a negro woman, named Maria. Hundley plead *non detinet*. A trial was had at the June term, 1842, and a verdict rendered for the plaintiff below, and the usual judgment entered.

On the trial, the plaintiff below read to the jury a deed from Archibald McManus to him for the negro in contest, with other property in trust, to secure the payment of two notes of about seven thousand dollars each, payable in 1836 to Reynolds, Marshall & Co., authorizing a sale to pay the debt in the event that they were not paid at maturity. The deed was in the usual form of deeds of trust, and was dated the 27th February, 1835. It was acknowledged in due form, and had the following certificates of record attached to it, to wit:

"*State of Mississippi, Hinds County.*

"I certify that the foregoing deed of trust was this day duly recorded in the probate clerk's office in said county, in book G., pages 434, 435 and 436.

"Given under my hand and seal of office, this 4th day of March, 1835.

[L. S.] "J. L. Goddard, D. C."

"*State of Mississippi, Hinds County.*

I, S. S. Scott, clerk of the probate court for said county, hereby certify, that the foregoing deed was on the 4th day of March, 1835, truly recorded in my office, in book G., pages 434, 435 and 436.

Digitized by Google

"Given under my hand and seal of office, the 27th day of March, 1840. S. S. Scott, *Clerk.*
[L. S.] Per H. Seaton, *D. C.*"

The plaintiff then proved that the negro woman Maria, in the possession of the defendant Hundley, was the same negro mentioned in the deed of trust, and then read the note in the deed mentioned as evidence of his debt. Jacob F. Foate, a witness for the plaintiff, proved that before the commencement of the suit, he called upon Hundley, the defendant, as agent for the plaintiff, and requested Hundley to surrender the negro in contest, which was refused. Lewis McManus, also a witness for the plaintiff, proved that it was the understanding between the parties to the deed of trust, that the property mentioned in it was to remain in the possession of McManus, until it was necessary to proceed under the deed. It was also proven that Buckner, the plaintiff, a short time before the commencement of this suit, in pursuance of the directions of the deed of trust, offered the property therein mentioned, including the negro in contest, for sale, and the most thereof, including the negro sued for, was bid off for Levin R. Marshall, and delivered to him or his agent, except the negro Maria, then in contest, who was not present, having previously been purchased by the defendant Hundley, at execution sale, as the property of McManus. The purchase for Marshall was made under the direction of the plaintiff.

The bill of exceptions recites further, that "there was no evidence that Marshall had ratified the purchase of the negro Maria."

This was all the evidence in the case. The defendant then moved the court to instruct the jury,

1st. If the jury find from the testimony that Buckner, the trustee, before the commencement of this suit, under the deed to him, sold the negro in contest to Levin R. Marshall, that the title is in Marshall, and the plaintiff has no right to bring this action, and they should find for the defendant — which was given by the court with this addition, that if the jury believe the purchase and sale to Marshall was made by Buckner, the

Digitized by Google

trustee, or by his direction, and had not been ratified by Marshall, then there would be no purchase or sale, and the title is yet in Buckner. To which addition the defendant objected and excepted, at the time of giving the same, and before the jury retired from the box.

The defendant then moved the court further to instruct the jury.

1st. That the deed of trust from McManus to Buckner, passes or passed no title to the plaintiff, because there is no such evidence as is required by law, that the deed was recorded in due time.

2d. If the jury find from the testimony, that the negro Maria sued for is the same mentioned in the deed of trust, still they cannot find for the plaintiff, unless they also find, from the testimony, that the negro mentioned in the deed was delivered to Buckner, the trustee, at the time of the execution of the deed.

3d. The jury cannot find for the plaintiff unless there is proof before them of the debt mentioned in the deed of trust, other than the recital in the deed, and the production of the note mentioned in said deed. All which last three instructions the court refused to give to the jury; to which the defendant at the time, and before the jury retired, excepted. The jury then gave the verdict before referred to, and the defendant moved the court to set aside the verdict and grant a new trial, because

1st. The jury found contrary to the evidence.

2d. The court improperly charged the law, and refused to charge as requested.

The motion was overruled, and exception was taken, and the cause brought by Hundley to this court by writ of error.

Hughes, for plaintiff in error.

1. But two questions are made in this court. Should the plaintiff below have made proof of his debt, secured by the deed of trust, other than by the recital in the deed, and by production of his note? This question we think is clearly for us. See 4 Watts, 359; 13 Viner's Abr., title Fraud, (F.) sec. 18, p. 522.

Digitized by Google

2d. It is insisted that possession should have accompanied the deed. Roberts on Fraud. Con. 489.

W. G. Thompson, on the same side.

By the law of this state the person for whose use any action may be brought, is considered the real plaintiff. If the trustee's sale to Marshall was valid, Marshall acquired both the legal and the equitable title to the slave; and the action should have been brought in his name alone. If that sale was not valid, he acquired no description of title, and the action should have been brought for the use of Reynolds, Marshall & Co. There is no ground on which it can be sustained in the name of the trustee for the use of Marshall.

The only evidence of the plaintiff's title which was offered in evidence, is a deed of trust. The entry made by "J. S. Goddard, D. C." cannot be recognized as an official certificate. The other entry made by the clerk on 27th March, 1840, stating that the deed was recorded in 1835, if it be a proper certificate at all of the recording of the deed, surely cannot be allowed to relate back to a period of five years past. Under our statute deeds of trust take effect only from the time they are recorded. Hundley had purchased the slave in controversy previous to the date of the only entry, which can be taken for a certificate by the clerk as the recording of the deed of trust.

It was incumbent on the plaintiff to show that he had title when the action was commenced. The plaintiff is required to prove the title which he sets up in his declaration. But in this case, the deed of trust, which is relied on by the plaintiff for title, shows a different title from what he claims in his declaration. He institutes the suit as trustee for Marshall; it appears in proof that he is trustee for Reynolds, Marshall & Co.

George S. Yerger, for defendant in error.

1. The first point is, whether the sale to Marshall by Buckner was void. On that point, I refer the court to my brief in the case of *James C. Wilkins* v. ———, before the court, and authorities there cited.

Digitized by Google

2. That the naming L. R. Marshall as the person for whose use the suit was brought, is surplusage, (the legal title being in Buckner.) Vide 8 Term R. 330; 7 Ibid. 47; 1 Chitty Plead. 57; Chitty on Bills, 9, note 1; *Smith* v. *Mabry*, 9 Yerg. 314; *Scott* v. *Dunn*, 1 Dev. & Bat. Eq. R. 415; 8 Martin's R. new series, 163; 6 Ibid. 684; 10 J. R. 223.

3. This case, on its merits, depends upon whether the probate and registration of the deed of trust to Buckner is valid. If it is, the title to the slave is in the plaintiff.

The act, in regard to deeds of trust, (see How. & Hutch. 344, sec. 5,) says that all such deeds "shall take effect and be valid," &c. &c., "from the time when such deed of trust or mortgage shall have been acknowledged, proved or certified, and delivered to the clerk of the proper court to be recorded, and from that time only."

The tenth section of the act (see p. 345,) requires the clerk, or his deputy, to certify the day of the month and the year, when he received it, and when the same is recorded, the number, book, page, &c.

The eleventh section imposes penalties on the clerk if he fails to do as directed.

The objection raised is, that it is not certified and put in the deed of trust the day it was delivered to the clerk for registration, as required by the 10th section above.

We reply, that this section is directory to the clerk; that its object was to ascertain the precise day when it was delivered for record, and to give it effect from that day.

If there is no statement in the deed the precise day it was filed, then it can only take effect from the day it was recorded. Because the 5th section gives it effect from the day of delivery to the clerk for record. If the certificate states it was recorded on a particular day, this is certainly clear and undisputed evidence that it was delivered on or before that day. It was obliged to be delivered on that day, otherwise the clerk could not have recorded it.

The object of the law was to give notice of the deed of trust, and to give it effect from the day of delivery to clerk. The ob-

Digitized by Google

ject is attained by recording the deed, and surely if it is recorded on the 4th March, 1835, by the clerk, it must have been delivered to him on or before that day, but as his record does not show the precise day, it must be taken to be the day of record.

But it may be objected, that the certificate of its record is by the deputy clerk.

This is authorized by the act of 1822, H. & H. 471, sec. 15, which says the deputy clerks shall have full power to do and perform all the duties enjoined on their principals."

J. F. Foute, on the same side.

1. Hundley claims under McManus, and therefore as the recitals in the deed and note would be, until disproved, conclusive against McManus, they are also so as against Hundley.

2. Admitting the first certificate to be wrong, the second is certainly sufficient; the certificate is but evidence of the record; the fact of the record is unchanged, whether the certificate exists or not. The statute does not provide *when* the clerk shall certify the fact of record; but only that his certificate shall be evidence of the due registration and record; which the second certificate states in full.

3. In cases of deeds of trust and mortgages, it is not requisite that possession should accompany the transfer; the deed is the legal delivery.

4. The motion for a new trial was properly overruled. The court will never grant a new trial where the verdict and judgment can be upheld on legal principles. 2 Bibb, 178; Ibid. 429; 1 Bibb, 248; *Hickman* v. *Sutherland*, 4 Bibb, 194.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of detinue brought for a negro slave, by the defendant in error, against the plaintiff in error. A verdict and judgment were rendered for the plaintiff in the court below.

Several questions have been made in argument. The title of Buckner as trustee, is derived from a deed of trust executed by A. McManus, to him to secure a debt due to Marshall, Byrne & Co.

Digitized by Google

The first objection to the recovery grows out of the certificate as to the recording of the deed of trust. This certificate is made and signed by a deputy of the probate clerk in his own name, and not in the name of his principal. The deed was read upon the trial in the circuit court without any objection of any kind, no motion was made to exclude it, nor any bill of exceptions taken to its admission. We would not lend a willing ear to the objection now for the first time raised. But there is another certificate of the recording of the deed signed by the name of the principal clerk, to which the only objection is, that it bears date some years after the first. It would not be proper to exclude the deed if the first certificate be bad, (as to which we give no opinion) when there is a certificate good in point of form, and to which no objection is made, except that it bears date several years after the deed was placed upon the record. Unless there were evidence to disprove this certificate, we could not pronounce it false, and exclude the deed.

Again it is insisted, that the deed of trust is void, because the slave was left in the possession of McManus, the grantor in the deed. The rule that if personal property be left in the possession of the vendor or grantor, it is evidence of fraud, has no application to deeds of trust or mortgages duly recorded. It is confined to absolute sales. The recording of the mortgage is equivalent to an actual delivery of the property. *Forbes* v. *Parker*, 16 Pick. 462; *Claiborne* v. *Hill*, 1 Wash. 177; *Glasscock* v. *Batton*, 6 Ran. 78; 2 Kent's Com. 530, n.

Another objection is, that there is no evidence of the *bona fides* of the debt secured by the deed of trust, nor any evidence of its existence, except the recital in the deed of trust, and the production of the note for which it was given. This was sufficient *prima facie* proof, and none other was requisite, unless this had been impeached.

The slave for which the suit was brought had been advertised and sold by Buckner as trustee, when the slave was not present, and was in the adverse possession of Hundley. The slave was bid off for Marshall, but was not delivered, nor was any payment made or credit allowed to McManus for the price,

Digitized by Google

so far as the record discloses. We will not undertake to decide, whether the sale is void or not, because made when the slave was in the adverse possession of another. The rights of the debtor would certainly seem to require that a sale should not take place under circumstances so well calculated to sacrifice his interest. "But when the sale is not upon credit, payment or tender of the price is a condition precedent implied in the contract of sale, and the buyer cannot take the goods or sue for them without payment." 2 Kent, 492. We do not think that Marshall could recover the slave by suit, in his own name, and the right of action must remain in Buckner.

In the action of detinue the legal title alone is in controversy, if there be equities they must be settled in some other mode. This action is not of that class, in which a suit can be maintained in the name of one for the use of another. *Smith* v. *Mabry*, 9 Yerg. 314. The name of Marshall in the record is wholly superfluous, no proof as to any equitable title in him ought to have been introduced. None indeed was introduced, except as to the trustee's sale. An allegation which is impertinent, or which need not be proved, may be looked upon as surplusage, and wholly disregarded. 2 S. & M. 150.

We cannot perceive that any possible prejudice has accrued to Hundley by the introduction of Marshall's name, as his title was not involved, being at most inchoate and incomplete. No objection was made upon this ground either, in the court below; if there had been, it might have been easily remedied.

The judgment is affirmed.

Digitized by Google

WILLIAM S. READ et al. *vs.* WILLIAM G. RENAUD et al.

Where the payee of a joint note, the makers of which reside in different counties, sues them all in a joint action in the county where one of them lived, and by writs to the different counties brings them all before the court of the county where the suit is instituted; and the maker residing in that county pleads to the action while the others make default, the holder of the note may discontinue his suit as to that maker and may take judgment by default final against the others.

A court having once acquired jurisdiction, does not lose it by any change of circumstances.

IN error from the Jefferson circuit court; Hon. C. C. Cage, judge.

William G. Renaud and David Grissom, for the use of L. W. Baldwin, brought suit to the November term, 1841, of the Jefferson circuit court, against William S. Read, John G. Fleming, and Philip O. Hughes, upon their joint and several promissory notes payable to the said Renaud and Grissom. A capias was issued to Jefferson county and regularly executed on Hughes, and a duplicate to Adams county, which was executed on Read and Fleming.

Hughes pleaded to the action, and Read and Fleming made default. The plaintiffs dismissed the suit as to Hughes, and took judgment by default against Read and Fleming, with stay of execution six months. From this judgment Read and Fleming prosecute their writ of error.

Sanders and *Price*, for plaintiffs in error.

It sufficiently appears that the judgment in this case is not rendered against any party over whom the court had jurisdiction, the only resident defendant, Hughes, was served with process in Jefferson county; he appeared and plead, the plaintiff without joining issue on the plea dismissed by his own motion

Digitized by Google

the cause as to Hughes. Thus by his own act he ousted the circuit court of its jurisdiction as to the other defendants; had they appeared and plead to the action, thereby waiving the question of jurisdiction, it might perhaps be otherwise; but as the record stands, the judgment is against two defendants, over whom, as shown by the record itself, the court had no jurisdiction.

This question has been fully settled in the state of Kentucky. (See *Brown* v. *McKee*, 1 J. J. Marshall, 474, and authorities there cited; *Parish* v. *Oldham*, 3 J. J. Marshall, 546; *Rogers* v. *Hagan*, 6 J. J. Marshall, 578; *Cowan* v. *Montgomery*, 7 J. J. Marshall, 299.) And we consider conclusively so by this court, in the case of *Bank of Vicksburg* v. *Jennings*, 5 How. R. 425; from which we insist that the judgment of the circuit court be reversed, and that this court render judgment dismissing said cause for want of jurisdiction, or that the same be remanded to the court below with instructions to that effect.

John B. Coleman, for defendant in error.

It is supposed that the plaintiffs in error expect to reverse this judgment upon the ground that when the suit was discontinued as to Hughes, the defendant, who resided in Jefferson county, the circuit court of that county thereby lost its jurisdiction over the other defendants.

This position is untenable, and is at war with the well settled principle that when a court once legally takes jurisdiction, it is entitled to retain it, though the circumstances under which its jurisdiction in the first place accrued, may have changed or ceased to exist. 4 Cowen, 717; 2 Wheaton, 290; 2 Peters, 157.; 9 Ibid, 413; 8 Ibid, 40; 9 Ibid, 224.

"The jurisdiction of the circuit court of the United States, having once vested between citizens of different states, cannot be divested by the change of domicil of one of the parties, and his removal into the same state with the adverse party, *pendente lite*." *Morgan's Heirs* v. *Morgan et al.* 2 Wheaton, 290. Hughes was a citizen of Jefferson county; process was regularly executed upon him by the sheriff of that county. The

Digitized by Google

jurisdiction of the circuit court was then complete under the statute, and the issuance of duplicate writs against the defendant, who resided in another county, was legal. How. & Hutch. 578, sec. 9. Would the death of Hughes, after service of process upon him and the other defendants, have abated the suit? Assuredly not. It would have survived against his co-makers, Read and Fleming. How. & Hutch. 578, sec. 8. Its discontinuance as to Hughes could produce no greater effect upon the jurisdiction of the court than his death would have done.

We are aware that the Kentucky decisions hold a contrary doctrine, but they can have no weight in the determination of this question, as they are entirely based upon a statute of that state, which provides "that in every species of personal actions, where there are more than one defendant, the plaintiff commencing his action in the county where either of them reside, may issue any writ or writs to any county where the defendants or any of them may be found; provided that should a verdict not be found against the defendant or defendants resident in the county where the action is commenced, judgment shall not be rendered in such action." 1 Brown & M. Ky. Dig. 343.

Mr. Justice CLAYTON delivered the opinion of the court.

The defendants in error brought a suit in the county of Jefferson against Philip O. Hughes, who resided in that county, and against William S. Read, and John G. Fleming who resided in the county of Adams. A writ and counterpart were issued, which were executed on all the parties. Hughes appeared and filed a plea to the action, the other parties failed to appear. The plaintiffs, in this state of case, dismissed their suit against Hughes, the defendant, who resided in Jefferson, and took judgment by default against those who resided in Adams. The whole question is, whether, in this state of facts, such course was admissible. It is insisted that by the dismission of the suit as to Hughes, the circuit court of Jefferson lost jurisdiction of the cause, and that the judgment against the others is a nullity.

We cannot give our assent to this construction. The court

Digitized by Google

having once acquired jurisdiction, did not lose it by any subsequent change of circumstances. We are not disposed to be governed by the Kentucky decisions, referred to in argument, because their statute contains an express provision, not to be found in ours, that if a verdict should not be found against the defendant residing in the county where the action is commenced, judgment shall not be rendered in such action. 1 Ky. Dig. 343.

The judgment is affirmed.

Digitized by Google

JAMES M. SMITH et al. *vs.* THE COMMERCIAL BANK OF RODNEY.

However defective a plea may be in form, if it be appropriate to the form of action, and go to the substance of it, it will be error to strike it out or reject it.

Special pleas, which amount to the general issue, must be specially demurred to; they cannot be stricken out upon motion.

To an action brought by a bank on a note payable to it by its corporate name, pleas denying the corporate existence of the bank at the time of the execution of the note, and setting up violations of its charter; and asserting a failure of the bank to comply with certain prerequisites to its corporate existence, however defective they may be in form, cannot be stricken out on motion, they must be reached by demurrer.

IN error from the Hinds circuit court; Hon. George Coalter, judge.

The Commercial Bank of Rodney sued James M. Smith, James Payne, and Daniel Frisbe, in assumpsit, upon a note payable to the plaintiffs by their alleged corporate name. The defendants, Smith and Frisbe, at the return term, plead non assumpsit, under oath, and eight special pleas; all of which were sworn to be true in substance, and in fact. The first of which denied the corporate existence of the bank, and the other seven, in substance, did the same, averring the non performance of certain prerequisites to its corporate existence. As the validity of these pleas were not passed upon by the court, they are not further here noticed. At a subsequent term, on motion of the plaintiffs, these special pleas were stricken from the record. Afterwards, process having been served on Payne, he plead at the next succeeding term non assumpsit; when by consent of counsel it was agreed that the special pleas filed and stricken out for the other defendants, should be considered as filed also for Payne.

At the June term, 1843, the case was tried, and a verdict rendered for the plaintiffs. A motion for a new trial was made

Digitized by Google

and overruled, to which a bill of exceptions was taken; from which it appears that the new trial was moved for, because the court had rejected the defendant's special pleas, and also, because at the trial the court had instructed the jury that the charter of the bank which was read to the jury was sufficient evidence that the plaintiffs were a corporation, under the general issue, the truth of which was verified by oath.

The defendants below prosecute this writ of error.

D. Mayes, for plaintiff in error.

The judgment should be reversed, because,

1st. The court erred in striking out the special pleas of Smith and Frisbe, on motion.

2d. Because the special pleas were afterwards received, and filed, by consent, as pleas for Payne, and remain unanswered by demurrer or replication.

3d. Because the court instructed the jury as to the weight of evidence.

On the first point. When a plea is filed in a cause there are but two modes of disposing of it known to the law. The one, by proceeding with the pleadings to issue, which may be an issue of law or fact. The other by signing judgment as for want of a plea. The first course was not pursued. If the pleas were such that, had the general issue been out, the plaintiff might have signed judgment as for want of a plea, I concede that the court might rightfully direct, that they be stricken from the record. If not such as to authorize the former, the court could not legitimately pursue the latter course.

A practice has prevailed to a certain extent, in the circuit courts of this state, to move to strike pleas from the record, on the mere ground that they are not a bar to the action, if true. If this practice is correct, the office of a demurrer is at an end. It is time that the true line which separates the classes of pleadings which may be stricken out on motion, from those to which the party shall be held to demur, be drawn. By reference to Tidd's Practice, 563, and the adjudged cases there referred to, it seems to me that an intelligible classification may be framed,

Digitized by Google

which will give something like system, and principle, to this now, at least to me, incomprehensible practice, as I have seen it in our inferior courts. I will make a hasty and imperfect essay, which the court, if they deem the subject worthy of the labor, will correct and improve. We ought to have some rule.

The plaintiff may sign judgment as for want of a plea. 1st. Where the plea is not adapted to the nature of the action, as *non est factum* to an action of assault and battery, or covenants performed to an action of debt, as in 4 Howard, 142.

2d. Where the pleadings, or proceedings, have reached a point at which pleas of the class filed are inadmissible, as a plea to the jurisdiction, after a plea in bar.

3d. Where there is a condition to be complied with before the plea can be filed, and that condition has not been complied with. As a plea in abatement, filed without affidavit, or of tender, without bringing in the money.

4th. Where the plea is upon the face of it absurd, as where the party pleads a former recovery, as having been had, upon a specific cause of action, before that cause of action accrued.

5th. Where the plea is unintelligible.

6th. Where the plea appears from the record to be false in point of fact.

7th. Where the defendant has pleaded a subtle plea, in order to entrap the plaintiff, and refuses to amend.

8th. Where sham pleas are pleaded, which require different modes of trial, as *nul tiel record*, which is to be tried by the court, and set-off, which is tried by a jury, the court may give leave to sign judgment as for want of a plea, if the defendant makes oath that the pleas are false.

9th. Where there is some trick or fraud resorted to by the defendant, in order to mislead the plaintiff.

There are some cases in the books, not embraced by this classification, but they are inapplicable to our practice.

Although I have examined, with no small degree of diligence, I have been able to find no case in which it is held that a plea may be treated as a nullity, merely because the facts alleged do not constitute a sufficient bar to the action, with one

Digitized by Google

solitary exception, in which the doctrine has undergone no examination, by either court or counsel.

Upon the second point, see *Dickson* v. *Hoff's Administrator*, 3 How. 165; *Irving* v. *Montgomery*, Ibid. 191.

As to the third point, had the court instructed the jury that the charter was evidence of incorporation, the instruction would possibly have been allowable. It would only have been a decision, that the evidence was of a quality to be weighed by the jury, but when the court say it is sufficient evidence, that is a decision upon its quantity or weight.

I have said the instruction would possibly have been allowable, had it been that the charter was evidence that plaintiffs were a corporation, because it appears to me that a mere charter does not create a corporation, and, taken by itself, is not evidence of a corporation. It is necessary that the charter be accepted by corporators. This acceptance may be proved by circumstances. That the defendants executed the note, and the plaintiffs sued on it, may be evidence of acceptance of the charter. The charter, and these facts, taken in connection, are evidence that plaintiffs were a corporation; but neither, taken alone, is evidence of the fact. Each constitutes a link in the chain, but only a link. The effect of the instruction is, that one link in the chain of evidence is sufficient proof of the whole claim. The court exceeds its office, when it weighs and pronounces upon the sufficiency of evidence. Even though we may clearly be of opinion, that the evidence was sufficient, beyond all doubt, the line of partition which separates the province of the court from that of the jury, must be sacredly observed. If we may pass it in any case, however manifest it may be that the judge weighed the evidence correctly, the line of separation is virtually annihilated. It then becomes a rule, that the judge may instruct on the weight, in all but doubtful cases. And who is to decide which cases are doubtful? None but the court. Then to allow him to do so for the reason that the case is not doubtful, is to reason in a circle. He may weigh the evidence, because the case is not doubtful. And the case is not doubtful because it so appears by the weight of the evidence.

Digitized by Google

J. F. Foute, for defendants in error, stated that this cause was submitted to the court by the plaintiffs in error, and its further prosecution urged by them, that on the part of the bank, and as its representative, he neither assented nor objected. Rumor had informed him that information, in the nature of a *quo warranto*, had been filed against the bank, and that it was then under injunction; and he did not wish, nor intend, in any manner, or to any degree, to violate that injunction, or be in contempt. That his attitude was purely defensive. He contended, 1. That the authority of the court to strike out, on motion, *frivolous pleas*, had become so universally prevalent, in this state, so well settled, and so useful and proper, that he deemed it unnecessary to trouble the court with references to authorities or precedents, on that subject.

2. That every matter of defence, presented by the pleas stricken out, was clearly admissible under the general issue, as pleaded.

3. That the bill of exceptions did not contain, or profess to contain, all the evidence; that the note sued on was on its face payable to the corporation, by its corporate name, and the defendants were estopped thereby from denying its corporate character; so that even if the instruction had been erroneous as to the effect of the charter, it could not affect the verdict; that the court would presume the other evidence not set out in the record would uphold the verdict.

Per Curiam. After verdict in the court below, the plaintiffs in error moved to set it aside, because the special pleas of the defendants were ruled out, or rejected, and also because the court charged on the weight of evidence in instructing the jury that the production of the charter was sufficient evidence of the existence of the corporation.

The pleas may have been defective, and it is believed most, or perhaps all of them, were so. But it is not every defective plea that may be treated as a nullity. When the defendant's plea is not adapted to the nature of the action, it may be treated as a nullity. But if it be appropriate to the form of the action,

Digitized by Google

as a general rule, it must be demurred to. Be it ever so defective, the plaintiff cannot, on that account, sign judgment, if it goes to the substance of the action. 1 Sellon's Practice, 310; 1 Tidd's Practice, 504. This rule is applicable, even in cases where the defendant is under a judge's order to plead, which is usually strict in requiring the defendant to plead issuably, &c. *Thellerson* v. *Smyth*, 5 D. & E. 152.

But it is said these pleas amounted to the general issue. If that be true, a special demurrer would have been the appropriate method of disposing of them. These pleas may be defective, that is not now the question. They go to the substance of the action. In the case of *Thellerson* v. *Smyth*, the judgment was set aside, because the plea was improperly treated as a nullity; and so the verdict in this case must be set aside, and a new trial awarded.

Digitized by Google

ALFRED REAVES et al., Administrators of Swan Thompson, deceased, *vs.* JOSEPH DENNIS.

The insolvency of the maker of a promissory note is no excuse for not making demand of payment, and not giving notice of protest.

Where the declaration against the indorsee of a promissory note in its first count was in the usual form, but in the second did not aver demand and notice to the indorser, but, as excuse for the omission, averred that the maker of the note was insolvent; and the defendant plead non assumpsit, and a verdict, without any charge from the court, on proof of the insolvency, was rendered for the plaintiff; and the defendant moved for a new trial, which being refused he embodied the testimony in a bill of exceptions, and brought the case to this court: *Held*, that the statute of jeofails did not preclude this court from examining the case, and granting a new trial for want of sufficient evidence to uphold the verdict.

The statute which allows exceptions to the action of the circuit court in granting new trials, makes it the duty of the high court of errors and appeals to revise the judgment of the circuit court, and to do what that court should have done.

Where the declaration fails to make out a case against the defendant, and he, instead of demurring, pleads to the action, and a verdict and judgment are given against him, it seems that, under the statute of jeofails, the defect in the pleadings will be cured, and the judgment be undisturbed.

But *aliter*, if the evidence be embodied in the record, on the overruling and motion for a new trial.

IN error, from the Pike circuit court; Hon. V. T. Crawford, judge.

Joseph Dennis sued Alfred Reaves and David Zeagler, administrators of Swan Thompson, deceased, in assumpsit, on their intestate's indorsement of a note made by Joseph Gates. There were two counts in the declaration; the first, in the ordinary form, averring demand and notice to the indorser; the second count, averred the making of the note, and its non-payment at maturity, and continued in these words: "And the said plaintiff saith, that at the time when said note became

Digitized by Google

payable, and from that time until now, the said Joseph Gates has been wholly unable to pay the same; neither could said money, or any part thereof, have been collected out of said Gates, by any legal proceeding, or in and by any suit at law; nor has the said Swan Thompson sustained any damage by reason of his not having notice of the non payment of the said sum of money by the said Joseph Gates." The breach was in the ordinary form.

The defendants plead non assumpsit by their intestate. A jury was empaneled, who found for the plaintiff; the defendants moved for a new trial, on the ground that the verdict was contrary to the law and evidence; which motion being overruled, they filed a bill of exceptions, embodying the testimony, which, in substance, established the insolvency of Gates.

The defendants below prosecute this writ of error.

W. P. Harris, for defendant in error.

It is not pretended that the proof offered in this case supports the count, which avers demand and notice, nor is it pretended the count which avers the insolvency of the maker as an excuse for demand and notice, would have been sufficient on demurrer. But the position which was assumed below is insisted upon here, to wit, that these objections come too late after verdict. Our statute, (H. & H. Dig. 591, sec. 11,) provides that, after verdict, &c. no judgment shall be stayed or reversed for any defect in form or substance, which might have been the subject of demurrer, and was not so taken advantage of.

The count under which the proof of insolvency was offered, is good, unless demurred to. That is, what is set forth in it amounts to a cause of action. The proof corresponds with the allegations, and is therefore sufficient to support the verdict. Certainly, the objection that the proof offered did not supply what was omitted in the declaration, is not well founded. The defendant below omitted to take advantage of the defect in the declaration by demurrer, and allowed a verdict to go. And that defect is thus cured, and the judgment by the statute above quoted, is not affected by the fault in the declaration.

Digitized by Google

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of assumpsit against the plaintiffs in error as administrators of Swan Thompson, deceased, upon his indorsement of a promissory note made by one Joseph Gates. The declaration contained two counts. The first averred a demand and notice in the usual form; the other, the insolvency of the maker as an excuse for want of demand and notice. The defendants pleaded *non assumpsit*. The only evidence upon the trial related to the insolvency of the maker; there was no attempt to prove demand or notice. No charge was asked of the court, and a verdict was rendered in favor of the plaintiff. The defendants moved for a new trial, which was refused; they then embodied the evidence in a bill of exceptions, and brought the case by writ of error to this court.

It is conceded by the counsel of the defendant in error, that the evidence was in legal effect, insufficient to warrant the finding of the jury, upon a proper state of pleadings. But he insists that the second count in the declaration was defective, and should have been demurred to, and that as no demurrer was filed, the defect is cured by the verdict, by force of the statute of jeofails and amendments.

That statute is very broad in its provisions, and cures almost every defect in the pleadings after verdict. But it has been decided in Virginia, under exactly the same statute, that "it gives to the verdict the effect of curing errors, only when the verdict is given without exception." *Truss* v. *Old*, 6 Ran. 560.

Our statute in regard to the allowing of exceptions to the granting or refusing of new trials, has an important bearing upon the subject. Upon the construction of this statute, this court has said, "if no charge be asked or given, and the case comes up on a bill of exceptions embracing the whole evidence, this court must consider whether the law which controls the cause, has been properly understood and applied to the facts by the jury. This task is a delicate and difficult one, but it must be performed. The inclination of the court will be to sustain the verdict, if it can be done on correct legal principles; but if

Digitized by Google

it cannot, we must give the parties another trial." *Leflore* v. *Justice*, 1 S. & M. 385.

The statute puts this court in the place of the circuit court, at the time of the rendition of the verdict. It is our duty to revise the judgment of the circuit court in this particular, and to do what that court should have done. We cannot but see in this case, that the verdict is contrary to law. The insolvency of the maker of the note, found no excuse for the failure to make demand and give notice to the indorser. The error of counsel in not taking advantage of this by demurrer, cannot shut out this conclusion from our view, or preclude the application of a remedy, when the whole case, facts and law, are brought under our inspection.

If there had been no motion for a new trial, and no exception to the judgment upon that motion, the result would probably be different. Upon a writ of error to the judgment, without reference to the testimony on which the verdict was given, and without reference to the motion for a new trial, there would be no error apparent upon the record, which would not be cured by the statute of jeofails.

The judgment must be reversed and new trial granted.

Digitized by Google

ELEANOR LEECH *vs.* F. COOLEY, Executor of James Leech, dec'd.

L. died in 1836, in this state, and by his will directed his slaves *to be set free and sent to Indiana or Liberia, as they might prefer;* he directed also the sale of his property and part of the proceeds to be paid to the slaves thus liberated: *Held*, that the will was valid, and the executor could proceed in its execution, and that the bequest of property to the slaves was not void for want of capacity in them to take; if they do not comply with the terms of the will, the bequest is void, if they do it is valid.

It is the policy of our state to prevent free persons of color remaining in it, nor does that policy conflict with the constitution of the United States, which declares 'that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;' as no person of color can become a citizen in the sense of the term used in the constitution.

APPEAL from the probate court of Wilkinson county; Hon. Francis Gildart, judge.

On the seventh of August, 1845, Eleanor Leech filed her petition in the probate court of Wilkinson county, representing herself to be one of the heirs and distributees of James Leech, deceased, who departed this life on the 4th of March, 1836, without children, or descendants of them; that she was a sister of his, and that according to petitioner's recollection there were three other sisters and three brothers of Leech; that her brother left a last will and testament dated the 4th of March, 1836, and admitted to record in the probate clerk's office of Wilkinson county, in the same year; that at the time of his death he was possessed of considerable personal and some real estate; that by his last will and testament, it was willed that his negro woman Delilah and her four children, or whoever of them should be living at his death, should be set free, and sent to the state of Indiana or Liberia, whichever they might choose, and that the balance of his property, (except a lot in the town of

Digitized by Google

Woodville, which was willed separately to Delila) should be sold, and the proceeds equally divided between Delila and Jack, Harriet and Nancy, three of her children; that Jack, Hariet, Nancy and Delila, were the slaves of the said James Leech, deceased, at the time of his death; that the appraisement of his personal property amounted to $708,25; that some of the slaves mentioned have been appraised; that on the 4th day of May, 1836, all of the real and personal estate of said James Leech, deceased, (except the slaves and the lot of ground devised to Delila) were by the executor sold on a credit of twelve months, and that the sales amounted to the sum of $3789,26; that an account of sales was returned of the above property into the probate court of Wilkinson county, and that that was the last settlement made by the executor on the estate; that so far as the will of Leech emancipates the slaves, and so far as the will devises or wills property to them, it is absolutely void, and that petitioner, as one of the heirs and distributees at law of James Leech, is entitled to her proportion or distributive share of said estate. The prayer of the petition is, that the executor inventory the slaves, as the property of the said James Leech, deceased, and that he make final settlement of said estate, and upon said final settlement being had, the court would *decree* to petitioner her distributive share. To this petition there was a demurrer by the defendant, which was overruled by the court, and this appeal taken.

Montgomery and *Boyd*, for appellant.

The principles of this case have been settled by the decision made by this court in 5 How. 343.

The only difference suggested by counsel for the defendants in error is not a substantial one, it is rather a distinction without a difference. In the case of *Ross* v. *Vertner*, the phrase used by the testator was, that his slaves should be sent to Liberia, "there to remain free," &c. &c. In this case the language is substantally the same, but the order of the words is inverted; they are, that the slaves in question "shall be set free and sent to the state of Indiana or to Liberia," &c. The intent in both

Digitized by Google

cases was the same, and the words used almost identical, though put together in a slightly different order. The correct rule in construing wills, is, that the intent shall prevail not only over the irregular grammatical structure of the sentences, but even over the express words used, where they would wholly frustrate the design of the testator. Bad grammar will not vitiate a deed, much less a will. "*Mala grammatica non vitiat chartam.*"

In the present case it is hardly necessary to resort to the principle alluded to. Without altering even the collocation of the words of the testator, the case comes within the rule laid down in *Ross* v. *Vertner*. "To set the slaves free and remove them to Liberia" is not a phraseology essentially different from that "to send them to Liberia and set them free." For this will does not direct the setting them free to be done within this state, but generally, as a general direction to the executor. Their freedom was the object in view, and the sending them out of the state, the means designated to attain this object. This is apparent from the consideration, that if freedom within the state had been contemplated, and had even been lawful, then the subsequent direction to send them out of the state would not have been complied with. Once free, the executors would have no further control over them.

These views are all sustained most satisfactorily in 2 Hill's Ch. R. 305. There the direction in the will was, that "the negroes be set free by my executors," and then, after directing a fund to accumulate for the benefit of the slaves, it was directed that this "fund was to enable them to go to St. Domingo or any other part they might choose."

Manumission within the state of South Carolina was prohibited, as with us, and the counsel for the next of kin of the testator, contended, among other things, that as the act of freedom was to precede the removal, according to the phraseology of the will, the whole was void. On the other side it was contended that the order of the words in the sentence or sentences of the will, made no difference. The intent being plain to send them away, and give them their freedom beyond

Digitized by Google

the limits of the state. Of this last opinion was the court, and finally directed the executors to execute the will by sending the slaves away, and further ordered the fund which had accumulated for the benefit of those slaves, to be paid to them.

This is conclusive both upon the true construction of the will now before the court, and upon the question of the right and duty of the executor to execute it, by sending them to Indiana, and sending them the several sums directed by the testator.

Farish, for appellee.

The object of the petition was not to review the proceedings of the probate court in relation to the will of James Leech, deceased, but on the contrary to compel the executor to continue the administration of James Leech's estate, to inventory property which no account is taken of, and to distribute that property according to law. By the demurrer it is admitted that petitioner is one of the sisters of James Leech, deceased; it is further admitted that Leech died without children or descendants of them. These admissions are sufficient to entitle the petitioner to her distributive share of James Leech's estate, if that part of James Leech's will, emancipating the slaves mentioned in the will, be void. This was not an application to the probate court to render void the entire will of Leech, but to treat as a nullity that portion of it emancipating the slaves and devising the proceeds arising from the sale of the property to these slaves. The first item of the will enables the probate court to hold good the probate of the will so far as the debts of the deceased are concerned, and so far as a settlement of the executor is required. The demurrer insists that the petitioner is not entitled to relief, because Leech left a last will and testament, and by that last will and testament the property of Leech was devised to different persons other than the petitioner. The heirs and distributees of James Leech, deceased, claim their distributive share of the personal estate of said Leech upon the ground that the devise of said testator emancipating the slaves, mentioned in the will, is void, and that a void devise cannot preclude the right of petitioner under the statute; the consideration for this court is

Digitized by Google

whether the clause in the will of Leech emancipating his slaves is void or not, the language of that clause is: "It is my express will and desire that my negro woman Delilah and her four children, or whoever of them is living at my decease, shall be set free, and sent to the state of Indiana, or to Liberia, whichever they may choose." I contend that this is a direct attempt on the part of the testator to emancipate his slaves by the will. It cannot be said that this is but a direction to the executor to take the slaves to Indiana or Liberia, there to be free; such a construction would do gross injustice to the direct language of the will: the taking of the slaves from this state is a subsequent act to the emancipation. In the case of *Ross* v. *Vertner et al.* the judge who delivered the opinion of the court, uses this emphatic language: If the will in this case provided for the manumission of the slaves in this state, it would then unquestionably be opposed to the principles of the statute, and could not be enforced. And it would be inoperative for the same reason that a deed or any other instrument for the same purpose, executed by the testator, would have been so. 5 How. 358. The question presented by the record to the court, in the case of *Ross* v. *Vertner*, was not whether the testator had the ability to manumit his slaves, without the consent of the legislature, but whether he possessed the power to send them to Africa, there to remain free? Does the record in this case present such a case to the court? The question here presented is, whether the testator can manumit his slaves by will, without the consent of the legislature. It will be no answer to the position I have taken, to say that the testator did not intend to violate the policy of the statute, inasmuch as he provided that the slaves might be taken out of the state. I do not pretend to controvert the object which the legislature had in view in passing the act found in H. & H. 166, s. 47, to wit: to prevent the increase of free negroes in this state; but the statute is positive that slaves cannot be emancipated by will or otherwise, without the sanction of the legislature. Now suppose the language of this will had been, that it was the express will and desire of the testator, that Delila and her four children, or whoever of them was liv-

Digitized by Google

ing at his death, should be free and sent to Indiana or Liberia, whichever they might choose; would there have been a doubt as to the intention of the testator to manumit by the will? Certainly there would not. In what does this differ from the language used? Simply in the word *set* before free. Can it be contended that this is a trust to be carried out by the executor? The enjoyment of the freedom was to take place from the death of the testator, and therefore could not wait for the action of the executor. No one can, by his mere act, unsanctioned by the public authority, set his slaves free in this country, either by will or deed. 5 How. 358.

Mr. Justice CLAYTON delivered the opinion of the court.

This controversy grows out of the will of James Leech, deceased, which directs that his four slaves be set free, and sent to Indiana or Liberia, as they may prefer. He also directed the great portion of his estate to be sold, and paid to the slaves thus directed to be liberated. One house and lot, however, he devised specifically to the female slave, but the validity of this particular devise was not in issue in the court below, and the executor, as such, is not the party with whom to contest this. The validity of the other provisions of the will, is the point in litigation.

The will bears a strong resemblance to that of Isaac Ross, which has been the subject of so much controversy in the courts of the state. *Ross et al.* v. *Vertner et al.* 5 How. 305. In that case the will directed the slaves to be sent to Liberia, there to remain free. He also bequeathed a fund to the American Colonization Society to defray the expenses of transportation of the slaves, and to apply the residue to their support in their new home. This will directs the slaves to be set free and then to be sent off; the order of the words being inverted. It is insisted that as the slaves cannot be liberated here, without the consent of the legislature, the bequest is wholly void.

The mere collocation of words, if their meaning be the same, cannot vary their construction. It is the policy of this state, as evinced by its legislation, to prevent the increase of free persons

Digitized by Google

of color therein. No one is permitted to emancipate a slave by deed or by will, to remain in the state without the consent of the legislature, specially obtained. If a free person of color come from another state into this, and remain beyond a certain time, he may be apprehended and sold. H. & H. 166–7. Nor is this legislative policy controlled by the provision in the constitution of the United States, which declares, "that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." No person of color can become a citizen in this sense of the term. They may become denizens in particular states, and may enjoy in them all the rights of citizenship, so far as state legislation can confer those rights. But when they leave the limits of such state, and enter another, they become subject to the laws of the latter, and must be governed by them. The general government does not interfere with the regulations of the states in this respect.

With this view of the subject, if the executor, in good faith and with strictness, comply with the terms of the will, we see nothing in the law to prevent its execution. The right to freedom under the will is inchoate, and becomes complete, when the subjects of it are removed to another state or country, according to its provisions.

The bequest to the slaves is not void either, for want of capacity in the legatees to take. If they do not comply with the terms of the will, the whole bequest is void; if they do, it will be valid. The case referred to in 5 Howard and of *Frazier* v. *Frazier's Ex'r.* 2 Hill Ch. R. fully sustain these principles.

The demurrer to the petition was therefore improperly overruled in the court below, and this court directs that order to be reversed, the demurrer to be sustained, and the petition dismissed, without prejudice to any claim which petitioner may prefer to the house and lot in the will named.

Order reversed, and petition dismissed.

Digitized by Google

Edwin Moody *vs.* George W. Farr.

Where a vendee, who has taken from his vendor a bond for title when the purchase-money is paid, has, on the payment of all the purchase-money, such an interest in the premises purchased, as is liable to seizure and sale under execution of *fieri facias* at law.

Where a purchaser, under execution at law of real estate, to which the judgment debtor had but a bond for title, files his bill against the vendor, averring that the whole purchase-money was paid by the judgment debtor before the sale under execution, and demanding title; and the vendor answer denying the payment by the vendee, and averring the cancelment of the sale, and delivery up of the title-bond before the sale under execution; *held*, that the purchaser at the sheriff's sale must prove satisfactorily that the whole purchase-money has been paid, or his bill will be dismissed.

On appeal from the decree of the superior court of chancery; Hon. Robert H. Buckner, chancellor.

Edwin Moody states in his bill that in August, 1839, he purchased at sheriff's sale under executions from the circuit court of Hinds county against John Shields, a lot in the city of Jackson, to which the sheriff executed to him a deed. That Geo. W. Farr, in November, 1833, bought the lot at public sale and paid the purchase-money; after which Farr sold the same property to Shields, and gave him a bond to make the title on the payment of the purchase-money; which Shields had paid up in full; that while Shields was thus owner of the lot, most of the judgments under which the complainant purchased, were rendered against him; that after the complainant's purchase at sheriff's sale, Farr repurchased the property from Shields, made a payment, of the character of which the complainant was ignorant, and obtained possession of the title-bond as a mode of reconveyance. That while Shields was the owner, Farr purchased the property at sheriff's sale, under execution against a former owner, in order to fortify the title he was bound to make

Digitized by Google

to Shields. That Shields was dead; and his wife's dower had been purchased by complainant. That under his purchase at the sheriff's sale against Shields, he had gone into the possession of the property; but that Farr had sued him before magistrates in an action for an unlawful entry and detainer, and had obtained an irregular and unjust judgment; from which he was about to appeal, when between himself and Farr it was agreed to abide the decision of the chancery court in the suit about to be instituted. That Farr pretends to be owner by virtue of his original purchase and the repurchase from Shields. The bill prays that Farr may be compelled to convey the title to the complainant.

Farr, in his answer to Moody's bill, admits the sale by the sheriff to Moody; states that he was present at it, and publicly and in the hearing of Moody, declared that Shields had not any title to or interest in the property, but that it belonged absolutely to himself; notwithstanding which Moody purchased. That in October, 1838, he made a contract with Shields for the sale of the lot; by which Shields delivered up to him $2800 of his paper held by Shields; and executed a written agreement to deliver by the first of January, 1839, to him, $3200 more of his liabilities, or other paper which should be satisfactory to him; the value agreed on for the lot being $6000; in consideration of which, he gave Shields a bond to execute to him a title on his payment of the $3200. That in March, 1839, Shields had not made, and was unable to make the payment of the $3200; when, in view of which, the whole contract between Shields and himself was rescinded; he delivered up to Shields his obligation to pay the $3200, and received back his title-bond; and inasmuch as the notes already given up in part payment by Shields had been destroyed, in view thereof Shields received three negro slaves, and a tract of 1280 acres of land in Texas; by which arrangement the sale made in October, 1838, was rescinded and annulled, and the title-bond then given being delivered up in March, 1839, had been since lost or destroyed.

He admitted he had bought the land at sheriff's sale, but it

Digitized by Google

was long anterior to the sale to Shields; before his sale to Shields, he had in 1835 sold the property to Young, and on obtaining judgment against Young for the purchase-money, he had bought it, and afterwards rescinded his sale to Young. That he is advised Shields never had an interest that could be sold under execution. That when Moody bought at sheriff's sale, he (Farr) was in quiet possession, and so continued until Moody, in October, 1839, unlawfully ejected his tenant, and took possession, and has been in possession and reception of the rents ever since, which were worth $50 per month; for which he contended Moody was responsible, and made his answer and cross-bill to effect that end.

Moody, in his answer to the cross-bill, averred that Farr was himself a bidder for the property at the sheriff's sale at which he purchased; and after the purchase by him offered to buy of him, and entered into an agreement for that end, but refused to carry it out. He denies that Farr was in possession when the sheriff's sale took place; but that one Baldwin, as tenant under a lease from Shields, was in possession; and that Farr had never been in possession since his sale to Shields; that the rents were worth about $15 per month.

It was proved by C. M. Hart, that when Moody purchased the lot at sheriff's sale, Farr gave notice that Shields had no title, and that Farr bid for the lot.

James W. Farr proved that in August, 1839, his brother, George W. Farr, was in possession of the property in controversy by his tenant Stevenson, who, after Moody's purchase, delivered the possession to Moody, his brother living about fifteen miles from Jackson; the lot at the time of the sheriff's sale was worth about $5000.

A. Robbins proved the property was worth about $4000; and would rent for $400 a year.

William Albertson testified, that he was one of the jury on an issue with reference to the property in controversy between Andrew Wilson and Henry S. Baldwin, on the 10th of March, 1839; at the trial of which, George W. Farr was a witness; who then testified that Shields was the owner of the lot, that

Digitized by Google

he had given him a title bond to it; that he had also purchased the property at sheriff's sale as the property of Young, and had directed the sheriff to make Shields a deed to it.

A. N. Huston proved the same in substance; with the addition that from what Farr said at the trial of the issue, of his direction to the sheriff to make the deed to Shields; that Shields had paid the purchase-money.

D. Shelton, Esq. proved that about the 10th of October, 1838, he wrote the bond for title from Farr to Shields; but does not recollect seeing it executed.

William C. Demoss proved, that as sheriff of Hinds county, he sold the lot as the property of Young in 1838, when Farr bought it, and directed him to make the deed to Shields, which he never did; that he afterwards as sheriff sold it to Moody, as the property of Shields.

Josiah Hicks proved, that in the spring of 1839 he was about trading with Mr. Farr for the property; Baldwin was in possession of it; and he applied to Baldwin to know if he bought of Farr whether he would give up possession; which Baldwin agreed to do, provided Farr would release him from some rent he was in arrear for; that he thought the lot was then worth about $3000.

Upon cross-examination he stated, that he offered Farr about $1500 for half the lot at that time; part of which was to be paid in a note of Farr's which he held for $1000, and the rest in a negro woman worth about $600, but the trade was not consummated; that Farr did not appear anxious to sell; but wished to pay his debt; which he subsequently did do; Farr was perfectly solvent; that if the trade had been made, he would have considered his half the lot worth $2500.

C. D. Learned testified, that in November, 1839, Moody leased the property in controversy to certain tenants at $50 per month; but that at that time, any property habitable, rented at high rates.

A. Robinson proved, that H. I. Baldwin was in possession of the property until the spring of 1839, as tenant of Farr, when he left it, and one Stevenson became Farr's tenant under a

Digitized by Google

special contract, at the making of which the witness was present; Stevenson staid in possession about three or four months, when Moody obtained possession, and had been in it ever since.

J. P. Oldham testified, that he was the justice of the peace before whom the suit of Wilson and Baldwin, to recover possession of the property in controversy, was tried in March, 1839; at that trial, the bond from Farr to Shields was exhibited to show Shields's title to the property; that subsequently, in a conversation between himself, Shields and Farr, Shields remarked that the time for making the deed to him by Farr had passed, and that he could exact of Farr the penalty for not making it, which Farr did not controvert.

Upon this state of pleading and proof, the chancellor dismissed Moody's bill; and also dismissed Farr's cross-bill, without prejudice to his rights at law growing out of the controversy.

From this decree Moody appealed.

Lea and *Lea*, for appellant, contended that

1. The material question in this cause is, whether Shields was at any time the legal owner of the lot in controversy, after the sale of the judgments against him under which it was sold to Moody; if so, the judgments were liens on the property, and Moody's title cannot be questioned.

This appears as well from the testimony as Farr's own admissions; and from his failure to controvert Shields's claim to a deed, when made in his presence; which silence on the part of Farr is that kind of acquiescence which has been considered as equivalent to a positive admission.

2. The interest of Shields on the payment of the whole purchase-money, was the subject of seizure and sale under executions against him. *Bogart* v. *Perry*, 1 J. C. R. 53; (and on appeal) 17 Johns. R. 352. So a person in possession of land, under a contract for the purchase and sale of it, has an interest in the land which may be sold on execution. *Jackson* v. *Scott*, 18 Johns. R. 95. In Maryland, it has been decided, that an equitable interest in land may be taken and sold on execution.

Digitized by Google

Thus, if A. purchase land from B., and pay for it without receiving a deed, or if B. hold it in trust for A., A.'s interest may be taken and sold on a *fi. fa.*; and the purchaser on execution will receive the aid of a court of equity to perfect his legal title. *Hopkins* v. *Stump*, 2 Har. & John. 301. Under the statute law of this state, it would seem that this question is free from difficulty or doubt. "Estates of every kind, holden or possessed in trust, shall be subject," &c. H. & H. 349, sec. 29. And when lands, &c. shall be sold on execution, it shall be the duty of the sheriff to make such deed to the purchaser as shall convey "all the right, title, interest, claim and demand of the debtor or defendant, which he had in and to such lands, &c., either in law or equity." H. & H. 644, sec. 48. Now what is an estate? If the vendor to whom the whole consideration has been paid, holds or possesses an estate in the land sold, and so holds or possesses in trust for the vendee, it follows that the estate, whatever it may be, is subject to sale on execution. The language of the statute is broad, comprehensive and positive. "Estates of every kind," &c. "The term estate," says Ch. J. Savage, "is very comprehensive, and signifies the quantity of interest which a person has, from absolute ownership down to naked possession. Real estate includes every possible interest in land, except a mere chattel interest." The vendor, then, who has not made a conveyance, has an estate in the land sold; and where he has received the whole consideration, it is well settled that he becomes seized in trust for the vendee. And so the case is clearly within the statute. But Shields had not only paid the whole consideration, which vested in him the entire equitable interest; he also held the possession; and possession of land is an interest that may be sold. 3 Caines, 189; 16 Johns. 192. And although a mere equity cannot be sold, yet an equitable interest, coupled with the possession, may be sold on execution. The interest of the party in possession is not a mere equity. *Jackson* v. *Parker*, 9 Cow. 81. And so Shields, having paid the consideration, and being confessedly in possession when the judgments were rendered, had a legal estate on which the judgments attached as liens, which could not be de-

Digitized by Google

feated by any subsequent transactions between him and Farr, nor by any claim of Farr's, however acquired or set up. The lot, therefore, was sold on executions founded on judgments which attached as liens on Shields's estate, and the sheriff's deed, by operation of the statute, vests Shields's entire interest, both legal and equitable, in Moody.

As to the effect of Farr's admissions, we content ourselves with a reference to a single authority — Gresley's Eq. Ev. 349.

D. Shelton, for appellee.

First. Shields was the holder of no interest that could be sold under execution, even if that sale had been made before the contract was cancelled.

1st. Shields was the holder of a mere equitable chose in action, and even if he had paid down the whole purchase-money at the time of the contract, his equitable interest could not be sold under execution. 16 J. R. 197. A judgment at law is not a lien on a mere equitable interest in land, and an execution sale will pass no interest which a court of law cannot protect and enforce. 1 J. C. R. 56; 17 J. R. 355.

2d. Shields being the holder of a mere equitable chose in action, if from the circumstance of part payment and possession, with Farr's consent a specific performance might have been enforced; yet more than half of the purchase-money was unpaid, and the equitable interest of Shields in the land could not exceed the proportion between the amount paid and the original consideration, which was not one half. Such an undefined and complicated interest cannot be reached by an execution. 1 J. C. R. 56; 17 J. R. 355.

Second. If Shields ever had any interest that could be sold under execution, that interest was divested by cancelling the contract, and redelivery of possession to Farr before the sale under execution.

1st. If Shields ever possessed anything beyond the mere equitable chose in action, it was naked possession; but the chose in action I have shown was not liable to sale, yet it may

Digitized by Google

be that the right of possession (which is a legal right) in an action of ejectment against Shields, would have been sustained in favor of a purchaser, but not against a third person holding the legal title, and having acquired possession prior to the execution sale. Thus, where A. purchases and pays for land, but does not take a deed, the vendor afterwards, by direction of A., conveys the land to B., a creditor of A., the land being levied on and sold under a judgment lien created against A. before the conveyance to B., an action of ejectment cannot be sustained on the sheriff's deed to eject B. The court decides that no interest whatever was conveyed by the sheriff's deed. 16 J. R. 196.

But suppose by the sheriff's sale Moody did take Shields's interest, legal and equitable, then it was only Shields's interest under the contract, and it shall in no way operate to the prejudice of Farr. Moody will therefore be substituted to Shields in the contract with Farr. Shields was entitled to the specific performance of that contract only, on payment of $3200 and interest from the 1st January, 18—. Moody is therefore entitled to nothing unless he will perform Shields's contract. The principle, if sustained for Moody, is, that he shall be entitled to all the right Shields had in the premises. That principle is thus limited, "but it shall be of no prejudice to the real owner." 18 J. R. 97.

It may be insisted that after the contract with Shields, Farr was seized of the legal title for Shields's use, and that under our statute (H. & H. 349,) Shields's interest as *cestui que use* was liable to sale under execution.

Two satisfactory answers may be given to this position.

1st. Under the facts of the present case, the payment of the $3200 was a condition precedent to making the title, and therefore until payment of the $3200 there certainly is no trust. 1 J. Ch. R. 54; 17 J. R. 354.

2. Our statute applies only to those cases in which the *cestui que trust* has the entire beneficial interest and the trustee the naked formal title. It may be, that if the contract had been fulfilled, so that Shields was entitled to a deed when the sale

Digitized by Google

was made, the statute might apply; not otherwise. 1 Johns. Ch. R. 54; 17 Johns. R. 354.

It is said that it appears, from the evidence, that Shields was the actual owner of the property in full; and that weight must not be given to Farr's answer because of his interest. The rule is otherwise. 9 Vesey, 282. The facts do not establish any title in Shields; but confirm the answer of Farr.

There is thus no error in dismissing the original bill; but in dismissing the cross-bill there was error.

Farr is entitled to a decree for possession; because it is agreed by the pleadings that possession shall accompany the result of this suit, and he has filed his cross-bill for the possession.

Farr is entitled to an account for the rents and profits on the cross-bill, because equity has jurisdiction on matters of account concurrent with courts of law. 3 Johns. Ch. R. 351, 361; 9 Johns. R. 470.

Because the court having obtained jurisdiction on the question of title, will give full relief to the party entitled to it. 17 Johns. R. 384; 10 Johns. R. 587.

Farr is entitled to have the deed made by the sheriff to Moody declared of no effect, thereby to remove a cloud from his title.

I think that these errors can be corrected in this court and on this appeal. By the 9th section of H. & H. 532, this court is given full jurisdiction in this matter. If the decree of the court below shall be reversed, the supreme court shall proceed to render such decree as the court below should have rendered.

That statute authorizes this court to make a final decree in the cause for Farr, directing among other things an account of the rents and profits, and removing the case back to the chancery court for the taking of that account, and for that purpose alone.

W. Yerger, on same side.

The rule of law seems to be well settled, that the equitable interest which a vendee has in property covenanted to be con-

Digitized by Google

veyed to him on the payment of the purchase-money, or the mere equitable interest which a debtor has in property assigned as a security on a resulting trust, cannot be had by an execution at law. 1 Johns. Ch. R. 52; 2 Johns. Ch. R. 312; 4 Ib. 690; 3 Paige's R. 219; Ib. 478; 1 Bibb, 306; 1 A. K. Marshall, 174; 1 Yerger, 3; Ibid. 79; Harper Eq. 184; 17 Johns. R. 356; 4 Bing. 96; 4 Barn. & Ald. 684; 1 Hammond, 314. This point has been so ruled repeatedly by the chancellor, and has met the almost unqualified approbation of the bar of this State. Freeman's Ch. R. 105; Ib. 401. And a court of equity will not compel the vendor to convey to the vendee at sheriff sale, even upon his paying the balance of the purchase-money, because there was no interest subject to sale at law, and the vendor at sheriff sale consequently purchased no interest whatever in the property. Harper's Eq. R. 184; 3 Paige's R. 22; 8 Martin's R. 706; 19 Ib. 602. These decisions, made in accordance with well-established rules of law, clearly sanction the opinion of the chancellor.

Mr. Justice CLAYTON delivered the opinion of the court.

The first point in this case is the same with that determined in *Goodwin* v. *Anderson et al.* The remaining question is one of fact rather than of law, whether the judgment debtor in this case had paid the *whole* purchase-money.

Farr was the original vendor, and Moody the purchaser at execution sale under a judgment against Shields, the vendee of Farr. The bill is filed alleging payment in full by Shields, charging Farr with fraud, and praying a decree of title against him. The answer positively denies the payment of the purchase-money, states that the contract with Shields had been rescinded before the purchase of Moody, and the title bond delivered up. Whether the purchase-money has been fully paid or not, is thus an issue fairly submitted to the court.

The testimony is not very clear and explicit, nor is it free from all doubt. But before the complainant can obtain a decree, he must satisfy our minds that he is entitled to it. This he has failed to do. The answer is very direct and apparently

Digitized by Google

candid in its explanations and statements, and whilst the testimony may cast some doubt over its averments, it falls short of that sort of conviction which would justify the rendering of a decree in opposition to it.

The decree of the court below is therefore affirmed.

Digitized by Google

MARTIN S. CARSON *vs.* JOHN DOE, ex dem. Robert Huntington.

In an action of ejectment, in which the lessor of the plaintiff claims through a purchase at sheriff's sale, a certified copy of the judgment, and a certified copy of the *venditioni exponas*, under which the land was sold, are the only parts of the record that need be introduced, to uphold the sheriff's deed.

IN error, from the Leake county circuit court; Hon. Morgan L. Fitch, judge.

John Doe, on the demise of Robert Huntington, sued Martin S. Carson, in an action of ejectment, to recover the possession of some lands in Leake county.

As the decision of the court turned on a single point, the facts with reference to that will only be stated.

Huntington claimed title to the premises by virtue of a purchase under execution, on a judgment rendered in the Madison circuit court, in favor of Grant & Barton against John S. Gooch. At the trial he read to the jury, in support of his title, the certified copy from the circuit clerk's office of Madison county, of the declaration filed in that court by Grant & Barton against James J. Spencer and John S. Gooch, founded upon a bill of exchange; the writ which issued upon it, and which was duly executed, and the judgment by default taken against the defendants; and two writs of *fieri facias*, one of which, to Leake county, was levied on the land in controversy, as the property of Gooch. These proceedings were duly certified by the clerk of the Madison circuit court, to be regularly copied from the records in his office.

The lessor of the plaintiff then read a certified copy of the *venditioni exponas*, directed to the sheriff of Leake county, with the return on it of the purchase by himself.

To the admission of these exemplifications of the record, as evidence, the defendant objected; his objection being overruled,

Digitized by Google

and a judgment being entered for the lessor of the plaintiff, the defendant prosecuted this writ of error; and now assigns as error, the admission of these copies of the record, as evidence to the jury.

W. Yerger, for plaintiff in error.

No copy of a record is evidence, unless it contain a certificate that it is a copy of the whole record. By an inspection of the certificate in this case, it will be seen that it does not purport even to be a copy of the record, but merely of certain *fi. fas.* &c., which had issued in the cause. It was, therefore, clearly inadmissible, and for this cause the judgment of the court below will be reversed.

Huntington, in proper person.

1. On the informalities in the certified copy of the judgment and preliminary proceedings, cited 2 How. 786; *Woodcock* v. *Bennett*, 1 Cow. 711; 3 How. 66, and cases cited; 4 Ibid. 269-271; 5 Ibid. 548; *Schrock* v. *Bowden*, 4 Ibid. 426; Ibid. 377; *Jackson* v. *Walker*, 4 Wend. 462: 12 Ibid. 96; 4 How. 269; Ibid. 270; 8 John. R. 361; 13 Ibid. 537; *Dorland* v. *Dorland*, 5 Cow. 417; *Caines* v. *Smith*, 8 John. R. 337; 3 Wend. 382; 5 Hill, 571.

2. On the point that the record was exemplified in two parts; *Loper* v. *State*, 3 How. 429, 430; *Packhard* v. *Hill*, 7 Cow. 434.

William Thompson, on same side.

Mr. Justice THACHER delivered the opinion of the court.

This is an action of ejectment instituted in the Leake county circuit court. Huntington claimed title to the land in question, by virtue of a purchase under a sheriff's sale. The bill of exceptions shows a copy of the judgment duly certified by the clerk, and also a copy of the *venditioni exponas*, under which the purchase of the land was made by Huntington. The sole objection made here is, that the evidence to this point was im-

Digitized by Google

properly admitted, because no copy of a record is evidence unless it contain a certificate of the proper officer that it is a copy of the whole record. A copy of the judgment, and of the *venditioni exponas* emanating from that judgment, constitute all that is necessary in a case of the kind before us, to be introduced from the record of the suit. These copies, having been separately certified by the clerk, were properly admitted as evidence. 3 How. 429.

Judgment affirmed.

Digitized by Google

14 114
J72 633

ORLANDO DAVIS *vs.* SAMUEL N. PRYOR.

A sheriff who has sold real estate by virtue of his office, is not bound to make a deed to the purchaser, until all the purchase-money is paid.

Executions in favor of the various officers of the circuit court of Tippah county, amounting to about $130, having been issued for costs against the Mississippi Union Bank, having come to the hands of the sheriff of that county, were levied on real estate of the bank; the sheriff sold the same for the sum of one thousand dollars to D. who offered the sheriff the amount due the officers of court, in specie, and tendered him the residue of his bid in notes of the bank, and demanded a deed to the property; *held*, that the sheriff had a right to demand gold and silver for the whole amount of the bid, and that D. was therefore not entitled to a deed from him.

Whether a *mandamus* is the appropriate remedy to compel a sheriff to make a deed to property which he has sold as sheriff. *Quære?*

IN error from the Tippah circuit court; Hon. Stephen Adams, judge.

Orlando Davis applied for a rule against Samuel N. Pryor, the sheriff of the county, to show cause why a *mandamus* should not issue against him to compel him to make title to certain real estate, bought at his sheriff's sale by Davis, as the property of the Mississippi Union Bank. Davis answered the rule and showed for cause, that sundry executions from the circuit courts of Pontotoc and Tishemingo counties, against the Mississippi Union Bank, for costs due the officers of said courts, in all amounting to the sum of $130,92½, were placed in his hands as sheriff of Tippah county; that he levied the same on a house and lot in Ripley, as the property of the bank. On the 6th of January, 1845, it was offered for sale, and Davis became the purchaser for $1000, and thereupon tendered to the sheriff the whole amount of the several executions in silver, and the remainder of the bid in the notes of the bank, and demanded a deed, which the sheriff refused unless he would pay the whole bid of $1000 in specie; which not being done he re-advertised and sold the

Digitized by Google

property to some other persons, and made a deed to them for the same, and they were then in possession. The court below, on this answer overruled the motion, dismissed the cause, and discharged the defendant. The plaintiff prosecutes this writ of error.

W. Yerger, for plaintiff in error.

The return of the sheriff to the *mandamus*, is conclusive, and by that, this case must be decided. I am told that the circuit judge thought the plaintiff was entitled to relief, but that he would have to seek it through the medium of a court of equity. In this the circuit judge certainly erred, as I shall proceed presently to show.

Our law provides that whenever a sale is made under an execution, and the amount of the sales shall exceed the debt, or damages, interest and cost for which the execution issued, the sheriff shall pay such excess or surplus to the debtor, &c. H. & H. Dig. 633.

The surplus over and above the amount of the executions in Pryor's hands was the property of the bank, or a debt due from Davis to the bank, and the question then arises, whether or not Davis had a right to pay that surplus in the notes or issues of the bank. By 2d section of act 1840, ch. 2, p. 21, it is enacted that "all banks in this state, shall at all times receive their respective notes at par in liquidation of their bills receivable, and all other claims due them." This statute settles the right of Davis to pay the surplus in the notes of the bank.

Upon this tender made by Davis in this case, it then became the duty of the sheriff to make him the deed.

Was the mandamus the proper remedy? A mandamus lies where there is no other remedy at law, and it is no objection to an application for it, that the party had a remedy by application to a court of equity. 3 Term R. 346; 10 Wend. 293. In this case, however, Davis had no remedy in equity. He was entitled to a deed, vesting in him the legal title, and it was the duty of the sheriff to have made him the deed.

A mandamus is the appropriate remedy to compel all ministe-

Digitized by Google

rial officers to do what by law it is their duty to do. 5 Comyn's Dig. tit. Mandamus, p. 33, and cases there cited; 1 Cranch, 137; 14 Johns. R. 325. 1 Cow. R. 62, 501, is directly in point, and was a case exactly like the present. The form of procedure in this case was regular, and precisely that adopted in *Marbury* v. *Madison*, 1 Cranch, 137. To multiply authorities on so plain a point, would be deemed an insult to the understanding of the court.

An inspection of the return of the sheriff in this case will establish the plaintiff's right. None of the reasons assigned by him constitute a valid excuse for a failure upon his part to do that, which by law it was his duty to do.

D. C. Glenn, for defendant in error.

1. The law requiring banks to receive their own paper in discharge of their debts, does not apply. Here was no debt to the bank. It was only a sale of property of the bank, and I have yet to discover the law, authorizing purchasers to pay for the same in bank paper. It may be said that the surplus of the bid beyond a sufficiency to discharge the executions was a debt to the bank. If so, it was not such a debt as was contemplated by the legislature in the act of 1840. It is not a "bill receivable," and the clause "other claims due them," refers to moneyed transactions, such as checks, bills of exchange, &c., where parties had become indebted to the bank in its banking character. In this case the execution was not in favor of the bank, but another. The purchaser receives valuable property, and is bound to pay a valuable price, which will go to the bank, its creditors, or whoever may be entitled to it. A different view would render the property of a broken bank as worthless as its paper.

2. Mandamus is not the proper remedy, admitting the party to be injured. It is called a high prerogative writ, which issues in all cases where parties have a right, and no means of enforcing it. 5 Binney, 87. It will never be granted, except where there is no other remedy provided. 4 Bac. Ab. There must be a right, without any adequate remedy, and the right

Digitized by Google

complete, not inchoate. 1 Wend. 318. There must be a specific legal right, and no legal remedy. 2 Binn. 362. It is only used to prevent a failure of justice; and from the very nature of the proceeding, its summary process and peremptory character, the courts have ever been justly cautious in it, and jealous of its consequences. 2 Cow. 482. In this case was there no remedy provided? I contend there was. In H. & H. 290, is given the form of a sheriff's bond, which is conditioned "in all things to perform his duties as sheriff." In same book, p. 644, ch. 48, sec. 48, it is made the duty of the sheriff to make a deed to purchasers for property sold. And in the first statute quoted said bond can be put in suit by any party injured by the misfeasance or malfeasance of the sheriff. Here is a specific, legal remedy, provided by statute, ample and complete. Again; the title, if any, which appellant acquired to this property, was an equitable one; from the time the property was knocked off to him, he acquired an equity in the same, to enforce which a court of chancery was, and is now open to him. And as the possession of a chancery remedy will not absolutely debar the writ, or the right, or destroy the jurisdiction of the court, it should always influence its discretion, under the facts and circumstances of each particular case. 10 Wend. 398. And again, it should not be granted against a public officer, when there is a remedy by action against him. He holds his office under the law which prescribes his duties, for a default in which he is liable to be amerced in damages. But before a default is fixed upon him he has a right to appeal to a jury of his peers, the constitutional tribunal in all cases of fact. Carry the doctrine out, and resort will be had to a mandamus in almost every case in which a sheriff is concerned — placing a power in the hands of the judiciary which they are not entitled to by law, and which they should be slow to assume. An authority precisely in point, sustaining my views, in 2 Cowen, 444.

3. Because it is a summary process, which never will be used where the right of third parties are concerned, and may be injuriously affected thereby. 8 Pick. Mass. R. 47. Upon the

Digitized by Google

resale this property was bid off to a third party, to whom the sheriff made a deed, and who now holds the legal title to the same. To grant this motion is to deprive him of his rights, and upon this motion he cannot be heard. This point alone I deem conclusive.

Therefore, as the appellant had his remedy by action against the sheriff, or in chancery, against all concerned, and the proceeding involves the rights of those who could not be heard, I think the court below was correct in discharging the rule.

Mr. Justice THACHER delivered the opinion of the court.

A rule was granted by the circuit court of Tippah county, requiring the sheriff of that county to show cause why a *mandamus* should not issue directing him, as sheriff of said county, to execute and deliver to Orlando Davis a deed for lot number five, in block number thirteen, in the town of Ripley, purchased under execution sale by said Davis. The sheriff returned for cause the circumstances — that several executions for costs, the amount of which was $130 92½, in favor of the officers of the circuit courts of Pontotoc and Tishemingo counties, against the Mississippi Union Bank, had come to his hands, and which he levied upon a house and lot in the town of Ripley; that in due time, this property was offered for sale under the executions for par funds, and purchased by said Davis, being the highest bidder at the sale, for the sum of $1000; that shortly after the sale, said Davis offered the sheriff the amount due the said officers of court upon their executions in specie, and tendered him the remainder of the purchase-money in the paper issue of the Mississippi Union Bank; that the sheriff refused to take the payment of the purchase-money as tendered by the said Davis, or to execute and deliver him a deed of the property; but, on the same day of the sale, and within the hours prescribed by law, again offered the property for sale, and sold it to some other persons, to whom he made conveyance, and who are now in possession of it. The circuit court of Tippah county discharged the rule, which judgment is claimed to be erroneous.

Digitized by Google

Without looking into the question of the propriety of the remedy against the sheriff by *mandamus*, in a case like the present, the circumstances surrounding the transaction alone seem sufficiently to warrant the judgment of the circuit court in disobeying the rule. The statute (H. & H. 644, sec. 48,) makes it the duty of the sheriff, when lands and tenements are sold under execution by him, to execute to the purchaser necessary and proper deeds of conveyance of such lands and tenements, but the law also annexes, as a condition precedent to the performance of this duty, the condition that the purchaser shall first make payment to the sheriff of the purchase-money. The statute (H. & H. 632, sec. 14,) has likewise provided that when, on any sale made under execution, the amount of the purchase-money shall exceed the debt or damages, interest and costs for which the execution issued, the sheriff shall pay such excess or surplus to the debtor. The reiterated decisions of this court have so adjudicated the law in regard to sales under execution, that the executions of the officers of the circuit courts of Pontotoc and Tishemingo counties could have been satisfied only by specie funds, that is to say, gold and silver. It follows, therefore, that the sheriff was compelled by law to sell the property seized under those executions for such funds. The purchase-money, consequently, could consist only of such funds. However, therefore, the law may control as between the sheriff and the Mississippi Union Bank, the debtor, there being an excess and surplus of purchase-money over the amount of damages, interest and costs in those executions, the sheriff could require the payment of the purchase-money in such funds before he could be compelled to execute and deliver the deed of conveyance.

Judgment affirmed.

Digitized by Google

Matthew Atchison *vs.* Lyman Potter et al.

Where a slave has been prosecuted before a justice of the peace for larceny, under the statute (H. & H. 164, § 40,) and the justice has adjudged the costs of the prosecution against the owner of the slave, the circuit court has jurisdiction of a *certiorari* at the instance of the owner, to determine whether, so far as the judgment for costs extended, the decision of the justice had been according to the law and facts.

The statute which subjects the master, employer or overseer of a slave convicted of larceny to the costs of prosecution, designed to render the person who had the slave in charge at the time of the commission of the offence, liable for the costs, whether he were the master, employer or overseer.

It would seem, therefore, that a judgment for costs in such case, against a master who had not the slave in his employ at the time of the offence, would be erroneous.

In error from the circuit court of Adams county; Hon. C. C. Cage, presiding judge.

On the 28th day of June, A. D. 1842, Lyman Potter made oath before a justice of the peace, W. P. Mellon, of Adams county, that Emma, the slave of Matthew Atchison, feloniously did steal, take and carry away one gold ring, of the value of $25, besides other articles of the further aggregate value of $62 25, the property of Potter; upon which, the justice issued his warrant for the apprehension of the slave, to appear before him on the day following, to answer the state of Mississippi on the charge of grand larceny, and to be dealt with according to law; the warrant being returned executed, the plaintiff appeared before the justice, and asked for and obtained a continuance of the trial until the following day; on that day, the slave Emma appeared and plead not guilty; whereupon, George Pulling and Henry Patterson, previously summoned for the purpose, were sworn as jurors to try with the justice the issue; who, upon hearing the cause, returned the following verdict, and rendered the following judgment, to wit:

Digitized by Google

"We the jury, find the prisoner guilty of petit larceny, adjudging the value of the ring proven to have been stolen, at $15; and order that the prisoner receive fifteen lashes, well laid on, upon the bare back, at the common whipping-post.

(Signed.) GEORGE PULLING,
H. PATTERSON,
W. P. MELLON, *J. P.*"

Whereupon the following judgment was entered of record:

"It is considered that Matthew Atchison, the master of said slave Emma, be taxed with costs of prosecution.

(Signed.) W. P. MELLON, *J. P.*"

The judgment of whipping was executed on the 29th June, 1842; on the 1st July, the justice issued an execution directed to any constable of said county, reciting as follows:

"Judgment being had before the undersigned justice of the peace, in and for said county, on the 29th day of June, 1842, for the sum of twenty-two dollars and eighty-seven cents costs, in the suit of the State of Mississippi against Emma, a slave, and Matthew Atchison, master of said slave, having become liable for the payment of the said judgment, you are therefore hereby commanded to make of the personal estate of the said defendant according to law, sufficient to satisfy the said judgment and costs, with lawful interest from the date of said judgment." Made returnable within twenty days.

Afterwards, on the 8th day of July, 1842, Atchison gave notice to all the parties interested, that he would on Saturday, the 9th day of July, 1842, at the office of said Mellon, move to quash this execution on the following grounds, to wit: "1st. There is no such record of judgment as recited in said execution. 2d. The said Matthew Atchison was no party to said judgment or suit in which it was rendered. 3d. The fees therein charged are severally illegal and void. 4th. Said Atchison, was not, at the time of the commission of the supposed felony or larceny, for which said slave was arrested and tried

Digitized by Google

in said case, the employer or overseer of said slave, but she was in the possession of, and employment of one Lyman Potter, Esq., the prosecutor in said suit. 5th. Because the said Lyman Potter, and not the said Atchison, is responsible and chargeable for all legal costs in the prosecution of said case." The parties appeared, and the defendants in error opposed the motion; on the trial of which, it was admitted by Potter, that he was the employer of the slave Emma, at the time of the commission of the offence charged. Whereupon the motion was overruled by the justice.

On the 14th July, '42, Judge Turner, one of the judges of the high court of errors and appeals, on petition of Atchison, granted a writ of *certiorari* with *supersedeas*, to remove the case to the circuit court.

The cause having been thus removed upon the motion to quash the execution, the defendants at the November term, 1842, moved the court to dismiss the *certiorari*, but the motion was overruled. At the May term, 1843, the defendants moved the court to strike the cause from the docket, and thereupon it was ordered by the court, that said cause be stricken from the docket, and that judgment final be entered against Atchison and security for all costs, on the ground that the court had no jurisdiction of the case.

From this judgment this writ of error is prosecuted.

Sanders and *Price*, for plaintiffs in error.

This contest involves a highly important principle to the owners of slaves, whether a party hiring a slave, shall be allowed, after the term expires, to prosecute such slave for an alleged larceny committed on his own property whilst he is the hirer and employer; and that the owner shall be charged with the costs of the prosecution, and the value of the thing stolen; for in the case referred to, the master would have been required to have restored the ring, had it not appeared in evidence that it had been restored to the prosecutor long before the commencement of the prosecution; and whether a magistrate has the

Digitized by Google

power in the case even of a criminal prosecution, to enter judgments against the owner of slaves to any extent, without a legal right to correct his errors.

We regard the jurisdiction of the circuit court in such case as unquestionably given in the following section of the statute: "All cases which may hereafter be decided by any justice of the peace in this state, may be upon good cause shown by petition, supported by affidavit, removed into any court having jurisdiction thereof, by writ of *certiorari* and *supersedeas*, which writ or writs, as necessity may require, shall be granted by the chief justice of the county court, or any judges of the superior courts of law in this state; and it may be lawful for any party seeking such writ or writs, to apply for the same at any time within twelve months after any such cause may have been determined; the party in all cases giving bond with approved security, as in cases of appeal from justices of the peace, and any cause so carried up by *certiorari*, shall be tried *de novo* on its merits." H. & H. 436, § 45.

The section under which the proceeding was had against the slave, as we presume, is as follows:

"If any slave or slaves shall feloniously take, steal and carry away, any goods or chattels under the value of twenty dollars, he, she or they so offending, and being thereof legally convicted before any justice of the peace, shall be deemed guilty of petit larceny, and the master, employer or overseer of such slave shall restore the goods and chattels so stolen, to the owner or owners thereof, or pay the value thereof to such owner or owners; and any slave so offending, or who shall be accessory thereto before the fact, shall receive any number of lashes, not exceeding thirty-nine, on his or her bare back, well laid on by order of said justice; and also the master, employer or overseer of such slave shall stand charged with the costs of prosecution. H. & H. 164, § 40.

The intention of the act is manifest that the person having the control over the person of the slave at the time of the commission of the offence, whether master, employer or overseer, is the person intended to be made liable for costs, and not all

Digitized by Google

three, or any that the caprice of the justice or the prosecutor may select, but only the one having the control and management of the slave at the time; a different construction would lead to infinite frauds between master and hirer, and would lead to a fruitful source of litigation between those relations. If the slave in the employ of a hirer should steal bread or meal, or any trivial commodity, he could, if excited against the master, reek his malice by flimsy prosecutions, tax the master for his cost, claim his and his wife's attendance as witnesses. Besides magistrates would likely be tempted to tax the costs against that relation of those parties who was best able to pay them. We therefore contend that the court erred in striking said cause from the docket, and that this court render judgment sustaining plaintiff's motion to quash said execution, or that the cause be remanded to the circuit court, with directions that it be reinstated upon the docket and be tried upon its merits.

Hewett, for defendants in error.

In 3 S. & M. 592, this court decide expressly, that the "master is liable for the property stolen" by his slave, and that he is so liable, whether the thing stolen is in his possession or not. Here it is alleged that the slave was not in the possession of her master at the time of the theft, and therefore the employer, the hirer, and not the owner, should be liable for the costs, the only liability in this case sought to be enforced.

In the absence of any statement of the legislative intention in any enactment, we must look to its operation to ascertain it with certainty.

We cannot suppose the legislature cared to discourage the hiring of dishonest slaves, or the becoming an overseer of such; but we may well suppose a desire, on their part, to discourage the importation into, and owning such property, in this state. At the date of the passage of the act, imposing the payment of the costs here in question, on the master, employer, or owner, there was, and for years continued to be, a great influx of slaves into this state, and often in the charge of a mere overseer, the owner residing abroad. In such case, he who

Digitized by Google

had charge of the slave who had violated the law, would with propriety be charged with payment of the costs taxed, not because he was in charge as "employer, or overseer," but because he had the opportunity of securing the repayment to himself, or surrendering the slave which had offended, in execution.

To suppose that an employer, by the hire of a slave for a few days, who had no agency in bringing the vicious slave into the state, and could exercise no control over his removal, should be charged with the consequences of such slaves' vices, in preference to the owner, is too preposterous to be discussed further.

As to the dismissal of the *certiorari* by the court below, we conceive it also was properly done.

The costs of a suit are incident to, and partake of the nature of the judgment.

In this case it was a criminal proceeding, and the payment of the costs by the master, &c., was as much a part of the judgment of the court, as the infliction of the punishment on the slave. It will not be pretended, we presume, that an appeal to the circuit court would lie for the latter; in this case, the reversal of the judgment would not operate greatly to her advantage. The appeal given by statute, from the decision of the justice to the circuit court, certainly contemplates only civil causes. All the provisions of the statute show this. See H. & H. 429, 436.

The act of 1830, (H. & H. 436, sec. 45,) evidently contemplates, equally with the preceding statutes, as to appeals, only civil cases. It provides that "all cases" decided, may be removed in the manner prescribed. And that when so removed, to wit, on petition to the proper officer, the party shall "in all cases give a bond as in cases of appeal from justices of the peace; and any cause, so carried up by *certiorari*, shall be tried *de novo*, on its merits."

Here a cause was not removed, that could be "tried on its merits," but a motion made to quash an execution for costs due

Digitized by Google

officers and others, in a criminal proceeding. We think the dismissal in the court below must be affirmed.

Mr. Justice THACHER delivered the opinion of the court.

A slave, alleged to be the property of the plaintiff in error, was convicted of the offence of larceny, which was charged to have been committed while the slave was under the control of Potter, one of the defendants in error. Judgment for the costs of prosecution was entered up by the justice of the peace against the plaintiff in error, as the owner of the slave, and execution issued thereon. The plaintiff in error sued out writs of *certiorari* and *supersedeas*, upon this judgment and execution, from the circuit court of Adams county, in which court the cause was stricken from the docket, on the ground of want of jurisdiction.

It is competent for the circuit court to take cognizance of a matter of this kind so far as the judgment for costs is concerned, and a case of the kind may be carried into the circuit court, from the judgment of a justice of the peace, in any of the modes provided by statute. Although the statute does not provide that an appeal shall lie to the circuit court from the judgment of a justice of the peace, and a jury of two slave-holders, upon a slave convicted of an offence punishable with stripes, and although the circuit court cannot inquire into the propriety of such judgment, it may, nevertheless, look at the facts for the purpose of ascertaining whether the costs of such a prosecution have been taxed against the proper party.

The statute, (H. & H. 164, sec. 40,) provides that, upon the committal of a slave of the offence of larceny, the master, employer, or overseer, shall stand charged with the costs of the prosecution. The act evidently designs to annex the liability for costs to the master, employer or overseer, accordingly as either has the care of a slave at the time of his commission of the offence. The object of the law is to render the immediate controller of the slave watchful over his conduct, and thus prevent, to some extent, the consequences which may arise from

Digitized by Google

the slave's ignorance of moral obligation. This view of the law is manifest from the provisions of another statute. H. & H. 171, sec. 58.

The judgment of the circuit court is therefore reversed, and the cause directed to be there reinstated for further proceedings.

Digitized by Google

William K. Collins, et al. *vs.* Thomas McCargo.

The following words in a bill of sale of negroes, viz.: "which negroes I warrant sound and healthy in body and mind, so far as I know or believe;" constitute unlimited warranty of soundness.

No action can be sustained by the vendee against the vendor of negroes introduced into this state as merchandise since May, 1833, for a breach of the vendor's warranty of the soundness of such negroes; the contract of sale and the warranty of soundness being void.

M. introduced negroes into this state as merchandise since May, 1833, and sold them to C., who gave a bill of exchange in payment, which not being paid, a compromise was made by which C. lifted the bill and gave his note instead; afterwards another compromise was made, by which C. was to give up to M. the negroes then living, and execute a bond with surety for a fixed sum; which compromise was carried out; *Held*, in an action on the bond thus given by C. and his surety, that these renewals and compromises did not change the character of the contract between the parties; all the subsequent contracts and agreements depending on the original illegal consideration were void; and no recovery could be had on the bond.

In error from the Adams circuit court; Hon. Charles C. Cage, presiding judge.

Thomas McCargo sued William K. Collins and Douglass H. Cooper on a writing obligatory, for $3030. The defendants pleaded two pleas. 1. That the supposed writing obligatory was given and executed by them in favor of the plaintiff, in part payment of certain negro slaves, (naming them) theretofore sold by the plaintiff to said Collins, which slaves the plaintiff warranted sound in body and mind; and they averred that two of them at the time of the making of the warranty, were not sound and healthy, but the reverse, and of no value.

2. That the writing obligatory was given and executed by the defendants to the plaintiff, in part payment of certain slaves in December, 1836, illegally and contrary to the constitution of

Digitized by Google

this state, introduced by the plaintiff as merchandise, and for sale, and sold by the plaintiff to the defendant Collins.

The plaintiff to the first plea replied that the bond was not executed in part payment for slaves warranted sound, in manner and form as alleged; to the second, that the note was not given for negroes introduced into the state and sold as alleged. Upon each of which replications issue was taken.

Upon the trial the jury found for the plaintiff, debt and damages.

A new trial was moved for and overruled, when the defendant embodied the evidence in a bill of exceptions.

John Branch, on the part of the defendant, testified that the plaintiff executed the following bill of sale in his presence, to the defendant, viz.:

"*Natchez, Miss.*, Dec'r. 16, 1836.

Received of Mr. William K. Collins, thirteen thousand dollars in full for the purchase of eight negroes, to wit: (naming them,) which negroes I warrant sound and healthy in body and mind, so far as I know or believe, and slaves for life; also warrant a good and lawful right and title against claims of every person whatsoever; as witness my hand and seal the date above.

THOMAS MCCARGO. [L. S.]

Witness, JOHN BRANCH."

The witness further testified that a draft was drawn by Collins upon him for thirteen thousand dollars in payment for these negroes, which draft he accepted in favor of McCargo; it was not paid, but was settled by a compromise between McCargo and Collins, and the latter's note given in place of the draft; and McCargo afterwards told him that this note was renewed or settled in part by another note; that McCargo also informed him that Collins was to execute to him a note for three thousand dollars, with Douglass H. Cooper as surety, and was to surrender up to him all the negroes then living, and to deliver to McCargo fifty bales of cotton in full payment of this last note. This last compromise was made in November, 1839; that after this compromise had been carried into effect, McCargo

Digitized by Google

applied to the witness to induce Collins to pay him the fifty bales of cotton, which Collins declared his inability to do, but promised to pay the money in the spring; that before the execution of the last note and the compromise, Collins had given a deed of trust to McCargo, to secure one of the notes given to take up the original bill of exchange, which deed of trust on the last compromise, McCargo directed the trustee to enter satfied, which was done.

The defendants read also the following receipt:

"Received of W. K. Collins four negroes, (naming them,) for which I bind myself to pay the said Collins one thousand dollars apiece; and upon selling the negroes, if they should bring more money, I will account to said Collins for it, after deducting the expense attending the sale of said negroes.

November 30, 1839. THOMAS MCCARGO."

It was admitted that the bond sued on was the one given on the last compromise.

John Holden testified that in the fall of the year 1836, he rented to McCargo a house near the race track; that McCargo informed him that he had brought on a lot of negroes from Virginia for sale, and wanted the house to accommodate them in; that the negroes had travelled from Virginia by land; upon which he rented him the house, and McCargo placed the negroes in it; that those sold to Collins were part of those which McCargo placed in his house, and stated he had brought on from Virginia with him; that he was present at the sale to Collins; that McCargo was a negro trader, and had for many years previous sold a lot of negroes in Natchez, and had returned to Virginia; that of his own knowledge he did not know that these negroes came from Virginia, his information was derived from McCargo; that McCargo had tents, wagons, and other arrangements for travelling, and informed the witness he had purchased these negroes in Virginia and had brought them to this state for sale, but did not say that he had brought them that year.

This was all the testimony. The case was submitted to the

Digitized by Google

jury without instructions, who found as stated, for the plaintiff. The defendants prosecute this writ of error.

G. Winchester, for plaintiffs in error:

1. As to the clause of warranty, contended that the words "which negroes I warrant sound and healthy in body and mind, so far as I know and believe," were a full and unlimited warranty.

2. That the bond sued on was given for an illegal consideration, and was void. *Green* v. *Robinson*, 5 How. 80; *Cowen* v. *Boyce*, 5 How. 769.

Montgomery and *Boyd*, on the same side.

As to the 1st issue. The court will perceive the plea alleges that the bill was given for slaves which were warranted sound, and avers that two were unsound. The replication puts in issue merely the warranty, which of course admits the unsoundness, and if the warranty was proved the defendants were entitled to a verdict.

The bill of sale, it will be seen, is not free from ambiguity, but we conceive it amounts to a warranty. The language is, "which negroes I warrant sound and healthy in body and mind, so far as I know or believe."

The question arises whether the words "so far as I know or believe," can be received as qualifying the former branch of the sentence, so as to, in truth, destroy the whole of its effect. For if construed in that manner, it will only amount to a declaration that he believes the negroes sound; or negatively, that he does not know or believe they are unsound; either of which renders the whole sentence nugatory, of no effect as part of the contract; and it must be admitted it was used for some purpose, and as it was the duty of the jury to put some construction on the sentence consistent with the intention and understanding of the parties, if they clearly erred in that, it is good ground for a new trial.

It is ridiculous to suppose the purchaser required a solemn affirmation of opinion merely. If he desired anything it must be

Digitized by Google

regarded as expressed in that part of the sentence which first strikes the ear. See 4 How. R. 59.

In cases of perjury it has been adjudged that the words "according to the best of my knowledge or belief," did not qualify the statement, so as to exempt the party from liability.

But as to the second issue there can be no doubt. The proof is clear that the negroes were brought to this state for sale as merchandise from the state of Virginia. And let Holden's evidence be twisted and distorted in every variety of shape ingenious counsel can conceive, it returns, when fairly viewed, to the same plain statement. He also identifies them as the same that were sold Collins. And Branch shows fully that the bill single sued on was but a renewal of the security originally given for the purchase-money. As to the consequence of bringing slaves into this state as merchandise, or for sale, no argument is necessary. See *Green* v. *Robinson*, 5 How. R. 80; *Cowen* v. *Boyce*, Ibid. 769; *Brien* v. *Williamson*, 7 Ibid. 14.

It may be objected, however, that as the original purchase-money was secured by bill of exchange and renewed and compromised, that the note or bill sued on could not be regarded as the security for the purchase-money; but in answer to this suggestion we will only refer to the case in 4 How. R. 656, *Rentfrow* v. *Shaw et al.*

Van Winkle and *Potter*, for defendants in error, contended,

1. That by the last compromise the original illegal contract was rescinded, and the bond executed by Collins must be looked upon and treated as being what Collins admitted to be just and due for his use of the property for nearly three years.

2. That the judgment of the court in overruling the motion for a new trial, could not be assigned for error; because the case was submitted to the jury on the evidence alone, and the statute authorizes this court to review the judgment of the circuit court upon a motion for new trial, only where the party against whom the motion is determined, shall conceive such decision to be contrary to the law of the land. H. & H. 493, sec. 52. In this case, the decision was upon the mere weight of evidence.

Digitized by Google

3. That the proof showed the consideration of the bond to be on a compromise and a rescission of the contract of sale, and the giving up of another note and the discharge of a deed of trust, the other note being given in lieu of a bill of exchange; that this proof did not support the issue, and the variance was fatal. Chit. Pl. 285, 377; et seq. 337; et seq. 348; 2 Phil. Ev. (Cow. & Hill,) 312, et seq.; Archb. Civ. Pl. 225.

4. The proof shows that the note given in lieu of the bill of exchange was secured by property conveyed by deed of trust; that this note was given up, and the deed of trust released by direction of McCargo. Now although the transaction might have been illegal, the property conveyed by that deed of trust was beyond the reach of Collins; he could not avoid the deed for that illegality. See numerous cases cited. 3 Phil. Ev. (Cow. & Hill,) 1446-1448. Under the facts of the case it may fairly be inferred, that the bond sued on was given in consideration that McCargo would cause the deed of trust to be released, and the property restored to Collins.

5. It was not proved that the slaves were brought to this state after May, 1833.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This action was debt on a writing obligatory for the sum of $3030, dated the 30th of November, 1839, and payable on the 1st of January, 1841. The defendant filed two pleas. 1st, that the writing obligatory was given for certain negroes which the plaintiff below warranted sound, but that part of them were unsound. To this the plaintiff replied, that he did not warrant the negroes sound. 2d, that the writing obligatory was given for negroes introduced into this state as merchandise, and for sale since the 1st day of May, 1833, to wit, in 1836. The case was submitted to the jury without any charge, who returned a verdict for the plaintiff, whereupon the defendant moved for a new trial, because the verdict was contrary to law and evidence which the court overruled. The question is, did the court err in overruling the motion?

A question is raised on the replication to the first plea, and

Digitized by Google

the proof under that issue, which, it is insisted, is sufficient, without regard to the proof under the second plea, to entitle the defendant to a new trial. The issue seems to have been narrowed down to this; did the plaintiff make a warranty of soundness? The defendant introduced the bill of sale, which contains this language: "which negroes I warrant sound and healthy in body and mind, so far as I know or believe." That this was a warranty of soundness, we think cannot admit of a doubt. The instrument is to be construed in favor of the vendee, and against the vendor. If this language did not constitute a warranty, it was entirely useless. It left the purchaser just where he would have been without any declaration, written or verbal, from the vendor. If he had sold without saying anything, knowing of unsoundness, the purchaser could have maintained his action for deceit, without any such warranty. The insertion of language which defeats the whole force of the contract, does not change its legal effect; it is to be disregarded.

It is unnecessary to sum up or recapitulate the proof under the second issue. It shows beyond all doubt that the negroes sold to the plaintiffs in error, by the defendant in error, were introduced into this state as merchandise, in the fall of 1836, by McCargo. It seems that the original price was $13,000, for which a bill of exchange was given, but which was not paid. A compromise afterwards took place, and the plaintiff Collins gave a note and lifted the bill. On the 30th of November, 1839, another compromise was made, by which Collins was to give up all of the negroes that were living, and to execute a note with Cooper as surety for $3000, which was to be paid by the delivery of fifty bales of cotton. Collins did deliver four negroes to McCargo, and took his receipt, bearing date the 30th of November, 1839, for which McCargo agreed to allow him one thousand dollars for each negro; but whether these were the only negroes of the lot sold, then living, or not, does not appear. The original contract was beyond all question void. Did these renewals and compromises change its character? The original contract being void, no valid agreement could be made to rest

Digitized by Google

upon the same consideration. They are all void so long as they can be traced back, and made to depend upon the original illegal consideration. Suppose we should consider the bill of exchange as the consideration of the note, that would not mend the matter. It was a mere nullity, and could not be made to support a valid contract between the same parties.

But it is insisted by counsel, that although the original contract was void, yet it was competent for the plaintiffs in error to make a valid contract for the use or hire of the negroes while they were in their possession. It is a sufficient answer to this, to say that there is no proof whatever that this writing obligatory was executed for that purpose. If such was the consideration, it was incumbent on the plaintiff to show it by rebutting proof.

We think the verdict was not sustained by the evidence, and that the court should have granted the new trial.

Digitized by Google

JOSHUA TERRAL *vs.* JOHN J. MCRAE, use of Simeon R. Adams.

In an action against a sheriff by the publisher of a newspaper, to recover of him the cost of his advertisements of sheriff's sales; the advertisement of such sales, though signed by the deputy sheriff, will be evidence against the sheriff.

IN error from the circuit court of Jasper county; Hon. Henry Mounger, judge.

John J. McRae, who sued for the use of Simeon R. Adams, sued Joshua Terral in an action of *assumpsit*, to recover the cost of printing advertisements of sheriff's sales for Terral, in the newspaper called the "Eastern Clarion," belonging to McRae.

The defendant plead *non assumpsit* and payment.

At the trial the plaintiff, proved that the account filed with his declaration, was a correct copy from his books, and the prices those usually charged. The bill of exceptions recites that none of the plaintiff's witnesses could say at whose request the work was done, whether at that of Terral or of his deputies; though one of the plaintiff's witnesses proved that the deputies of Terral were in the habit of advertising at his office. It was further proved by the defendant, that his deputies caused the publication of most of the advertisements contained in the bill of particulars.

On this proof the defendant asked the court to instruct the jury, that "a deputy sheriff, as such, and acting in that capacity, cannot make a contract for advertisements of property in a newspaper, that will bind the high sheriff, unless authorized by the high sheriff so to do." This charge was refused; when the court, at the instance of the plaintiff, charged the jury "that if they believed from the evidence that the work charged for, was done by the plaintiff for the defendant at his request, or that of his deputies in his office, as sheriff, and in the discharge of it, they should find for the plaintiff."

Digitized by Google

Under these instructions the jury found for the plaintiff; and the defendant, after an unsuccessful motion for a new trial, prosecuted this writ of error.

J. Heyfuon, for plaintiff in error.

The only question in this case is this: was the instruction asked for by the counsel of defendant agreeable to the rules of law? That it was relevant to the evidence and not hypothetical, will not be denied. A deputy sheriff is not the general agent of his principal. He is his agent only in performing such acts as the law requires the sheriff to do. The sheriff may make a contract touching the execution of his office, which will be binding upon him, although not compelled by law to make it. But his deputy as such cannot do so. See 5 Vermont R. 136; 4 Mass. R. 60. Where the sheriff is not bound by law to do the act, his deputy cannot by contract make him liable for it. "If this be the law, the remaining part of the question is simple. Was the sheriff bound by law to go to a newspaper office, and pay out of his pocket money for the purpose of advertising property taken under writs of execution?" We think not; it is his duty to give notice to the plaintiff, that the money is required for the purpose. And inasmuch as the law makes the sheriff in some cases the agent both of plaintiff and defendant, we are strongly inclined to think that if the sheriff sends such advertisements to an office for publication, he does it as the agent of the plaintiff in the execution, and the printer gives the credit to the plaintiff. It would be extremely hard to require an officer to pay more money for the advertisement of property than it would bring at sale. And the charges of a printer may be very extravagant, not being fixed by law. We therefore think the court erred in refusing the instruction asked for by us, and in giving that requested by the counsel of plaintiff in the court below.

Freeman, for defendant in error.

Defendant in error obtained a judgment below against Terral, as sheriff, for advertising sheriff's sales and for sheriff's

Digitized by Google

blanks, &c., which work was performed in the year 1838. At that time it was the duty of the sheriff by law to advertise execution sales in a newspaper, if there was one in the county where the sale was to take place. H. & H. 633, sec. 17, title Executions. The deputy sheriff requested the printing to be done for his principal, and it being the duty of the sheriff by law to make such advertisements, the deputy sheriff was the agent of his principal for that purpose, the same being within the scope of the sheriff's official business. See Story on Agency, 20, title General Agency.

The charge of the court to this effect is the error complained of. The finding of the facts by the jury is conclusive on that point, and will not be disturbed on appeal.

Per Curiam. This was an action of *assumpsit*, brought by defendant in error to recover the price of advertising sheriff's sales in a newspaper. It was in evidence, that the deputies of the sheriff were in the habit of having advertisements inserted in the paper, and some of the advertisements introduced were signed by the sheriff only. The objection is, that the sheriff was not bound by such contracts made by his deputies. The account was created in 1838, when it was part of the sheriff's duty to advertise his sales under executions in a newspaper. In all official acts the deputies may bind the sheriff. In the regular discharge of official duty, the acts of the deputy are the acts of the sheriff. The advertisements of the deputy are the advertisements of the sheriff. The case of *Marshall* v. *Hosmer*, 4 Mass. R. 60, only decides that the sheriff is not bound by a contract made by a deputy with the plaintiff, to do what by law he was not obliged to do. The contract in this instance was in reference to a duty which the sheriff was obliged to perform, either by himself or by deputy, and he is bound by the acts of his deputy in the discharge of that duty. *McIntyre* v. *Trumbull*, 7 Johns. R. 35, and authorities there cited. The charge of the court was therefore correct, and the judgment must be affirmed.

Digitized by Google

JOSEPH TERRY et al. *vs.* JOSEPH WOODS et al.

The assignment of a note, secured by mortgage, carries the benefit of the mortgage along with it, to the assignee.

Where the assignee of one of a series of notes, all secured by mortgage, sues the debtor at law, and arrests him upon mesne process, and afterward, from the inability of the debtor to give bail, and, out of clemency, discharge him from the arrest, the mortgage lien of such assigned note will not thereby be divested, or taken away. It seems it would be otherwise, if the discharge were upon an arrest on final process.

Where the holder of one of a series of notes, secured by mortgage, upon the arrest, on mesne process, of the judgment debtor, discharges the debtor from the arrest, and, at the same time, receives a steamboat from him as collateral security, which he afterwards exchanges with the debtor for notes, also as collateral, which prove worthless; the holder of the assigned note does not thereby discharge the lien of the mortgage as to the note so held by him.

Where a decree was rendered at the suit of the holder of one of a series of mortgaged notes, against the mortgage debtor, subjecting the property mortgaged to the payment of the mortgage debt, and in neither the pleadings nor proof did it appear that the mortgaged property was an inadequate security for all the mortgaged debts: *Held*, that, at the mere suggestion of counsel that such might be the case, the decree would not be reversed.

Where the holder of one of a series of mortgaged notes indorses the note to a third person before due; and after its maturity and nonpayment, takes it up, and becomes again the holder thereof, he will not thereby lose his recourse upon the mortgaged premises, but will be substituted again to his original rights.

ON appeal, from the district chancery court at Carrolton; Hon. Henry Dickinson, vice chancellor.

Joseph Woods, Robert Woods, John Bell, and Jane Bell, partners, under the firm of Yeatman, Woods & Co., exhibited their bill in the district chancery court at Carrolton, against Joseph M. Terry and others, averring that, in the year 1835, Hugh B. Johnson, deceased, and Robert H. Sterling, bought a tract of land and some negroes, of Joseph M. Terry, on a credit,

Digitized by Google

for $100,000, for which they executed various notes and bills of exchange, with personal security, together with a mortgage on all the property thus sold, to secure their payment; that one of the bills of exchange thus made and secured for the sum of $12,212, due in April, 1838, and accepted by Byrne, Herman & Co., of New Orleans, was sold by Terry, and by him regularly indorsed to the complainants, after the execution and registration of the mortgage, for cash; the interest and usual charges for advancing money, being deducted. That at its maturity this bill of exchange was protested; but that $6200 81 had been paid upon it by Johnson; the residue, with interest and damages, being still due; to foreclose the mortgage upon which was the object of the bill.

The heirs and personal representatives of Johnson; Sterling, Terry, and one Augustine D. Statham, who was averred to be in possession of, and to claim title to the mortgaged property, through some right derived from Terry, were made defendants to the bill. The prayer being for an account, and a sale of the mortgaged property.

Terry, in his answer, admitted the execution of the mortgage, and the bill of exchange, but denied the sale of the latter to the complainants; he averred that he sold it to a broker in New Orleans, at a discount of 15 or 20 per cent.; he denied all knowledge of the protest, and averred that he had never received any notice of the non-payment of the bill. He avers also that Sterling, besides the sum paid by Johnson, paid the complainants about $8000. He denies the right of the complainants to the relief they pray for; and by way of cross-bill, charges that the complainants received of Sterling the said sum of $8000, by a steamboat, which they attached in Louisiana, of his, called the "Choc-chu-ma," and which they received in discharge of all claims against said Sterling, on said bill of exchange, and in payment of $8000 thereon; and at the same time dismissed an action at law which they had brought against Sterling, in person, on the bill of exchange; that they delivered the steamboat to Sterling, binding him to keep them harmless, as owners, against the expenses of running it, to keep her insured, to re-

Digitized by Google

turn it when called upon, and to make up the deficiency between her value, when returned, and the $8000. Terry further avers, that this attachment suit against the steamboat, and the personal action against Sterling, on the bill of exchange, were fully settled in Louisiana, and operated as a discharge and satisfaction of the bill. That the complainants recovered a judgment against Johnson, in his lifetime, in Louisiana, which but for fraud, or gross neglect, they might have realized in full, as Johnson had ample property there; which, he also contended, worked a discharge of the mortgage. That while the complainants held the bill, they indorsed it to one James Irwin, who indorsed it to the New Orleans Canal and Boating Company; and that, while thus held by Erwin, he was advised to sue Johnson on it in Mississippi, which he refused to do, on the ground that he would be paid in depreciated paper; and that by the settlements made by the complainants in Louisiana, with Sterling, the acceptors, Byrne, Herman & Co. were discharged from their liability on the bill; any or all of which, Terry contended, freed him and the mortgaged premises from liability on the bill of exchange. Sterling, in his answer, admits the execution of the bill and mortgage, and the payment of the sum by Johnson, which he says is all that the plaintiffs have received, so far as he knows. He says that a steamboat, owned by him, called the Choc-chu-ma, was attached by the plaintiffs in New Orleans, and he was also personally sued, and judgment recovered against him, in Louisiana, on the bill; that fearing, lest his boat, by exposure to public sale, might be sacrificed, he agreed with the complainants to convey it to them at the nominal price of $8000, but purely as collateral security for the bill of exchange; he to take charge of the boat, with the agreement to return and account for it, whenever called on; that afterwards, in order to effect a total release of his boat from this liability to immediate seizure and sale, he deposited in lieu and discharge of his boat, but still as collateral security for the original bill of exchange, $35,375 77 in amount, of promissory notes, with William M. Beal, to pay out of the proceeds the sum due on the bill of exchange to the complainants; that at the

Digitized by Google

time he and the complainants thought the notes valid, and the consideration good; but since, the notes had proved worthless, and the complainants had realized nothing out of them, nor out of the steamboat, while in their possession, or since. That Johnson was fully privy to the seizure and discharge of the steamboat, and at the time confessed judgment in Louisiana for the amount of the bill. That he had previously sold out to Johnson all his interest in the land and negroes bought of Terry, and had Johnson's bond to save him harmless from all the debts growing out of the purchase.

The agreement in writing, with reference to the steamboat, between Sterling and Yeatman, Woods & Co., was filed with Sterling's answer, and contained the express stipulation, that the steamboat was only received as collateral security, and was not to impair any rights growing out of the bill of exchange.

The answer of the administrator of Johnson averred the declaration of the probate court of the insolvency of the estate.

Statham answered that he had purchased the land and negroes from Terry, in ignorance of the rights of the complainants.

Yeatman, Woods & Co. answer the cross-bill, and deny that they ever discharged Sterling from his liability on the bill of exchange, or that the judgments obtained by them in Louisiana against Sterling, were ever discharged. They proceed to answer the charges with reference to the steamboat Choc-chuma, and the notes of West & Phelps, for $35,375 77, substantially to the same effect as stated by Sterling, and exhibit a copy of the agreement, with their answer. They state further, that Johnson offered, afterwards, to confess judgment on the bill of exchange, in Louisiana, if they would give up to him these notes of $35,375 77, which had proved valueless, and which were deposited by Sterling with Beal, but which were all payable to Johnson, and were really his property, and had been lent by him to Sterling, to be used to effect the discharge of his steamboat. This arrangement was made, the judgment confessed, and the notes delivered up. They deny that, either by fraud or neglect, they failed to realize this judgment out of Johnson; they used all efforts, but failed.

Digitized by Google

They admit the truth of the charge with reference to the indorsement to Erwin, and by Erwin to the Canal Bank, but say that, upon the non-payment by the acceptors and indorsers, they were obliged to take it up again.

They deny that Byrne, Herman & Co., the acceptors, were ever released from the bill; but aver that they are still liable upon it, but insolvent; and that the whole of the bill is still due to them, except the sum credited.

They filed with their answer a record of the judgment and proceedings, in the parish court for the parish and city of New Orleans, in their suit against Sterling, on the bill; by which it appears that Sterling was arrested on mesne process, on the affidavit of the plaintiffs. That he was a non-resident, and the steamboat was attached at the same time.

The agent of the plaintiff directed the sheriff, in writing, "to give up to R. H. Sterling the steamboat Choc-chu-ma, attached by them, as the attachment had been settled." They directed the sheriff, also, to permit Sterling "to go wheresoever he might think fit, in or out of the city, at their risk, as they had no disposition to interrupt the personal comfort or movements of Sterling."

The testimony of Joseph W. Walker, taken by the complainants, proved the execution of the agreement, with reference to the steamboat Choc-chu-ma, and its reconveyance to Sterling; and that the complainants became the owners of the bill of exchange, about the 9th of January, 1837; it contains also statements of the dates and amounts of the judgments against Johnson & Sterling, and the reasons why the debt was not made out of Johnson's property in Louisiana, and other matters, which it is not deemed material to notice.

James Irwin proved that, as agent of the plaintiffs, he had Sterling arrested, and discharged him from the arrest, because he could not give bail, and at the same time received from him, as collateral security, the steamboat Choc-chu-ma; his testimony on this subject, is the same with the statements of Stirling, in his answer.

Upon this state of pleading and fact, the vice chancellor

Digitized by Google

ordered an account to be taken of the sum due to the complainants; which was reported to be $9802 89; upon which the chancellor appointed a commissioner to sell the real estate conveyed by the mortgage, or enough of it to pay the sum due to the complainants, to make deeds to the purchasers, and to bring the proceeds of sale into court; from which decree the defendants prayed this appeal.

William Thompson, for appellants.

1. It is contended, that levying the attachment sued out in Louisiana by complainants, on the steamboat Choc-chu-ma be-belonging to the mortgagors, was a satisfaction of the debt due to complainants; to obtain satisfaction of which out of the mortgaged property in Mississippi they filed their bill. See 1 How. R. 48, and also the case of *Redus* v. *Wofford*, decided by this court at the present term. And that the subsequent release of the property by complainants, and the release also of the defendant Sterling from arrest, in a suit against him in New Orleans for said debt, (all which appears in the record) would be bad faith to Terry, if they could now subject the mortgaged property to their debt in whole, or by a *pro rata* division with the other debts secured to Terry by the mortgage.

2. It is contended that the evidence in the record shows that the boat was taken in payment by complainants at $8000, which paid off all their debt, except the amount paid subsequently by Johnson, as appears in the answer of complainants to Terry's cross-bill.

3. When the complainants had their attachment levied on the boat, and their debtor arrested in New Orleans, they had a security for their debt, which in good faith to Terry, who was interested with them in the property mortgaged in Mississippi, required them to have held on to; and to have had appropriated to the payment of their debt the property attached, and if it was not sufficient, to have availed themselves of the benefit and advantage growing out of the arrest in New Orleans.

Conceding, for argument sake, that they had an interest in the mortgage while the note was in their hands; and that at law

Digitized by Google

they could sue the debtors on the note, Sterling and Johnson, after having paid the bank and taken it in; still that does not prove that they are in equity remitted to their right on the mortgage, which they had parted with when they indorsed the note.

5. This bill in chancery was filed in the fall of 1842, and it is alleged that the acceptors were insolvent then; but there is no allegation or proof that they were insolvent when the bill of exchange fell due the 4th of April, 1838, and we contend that the complainants released them by their arrangements with Sterling and Johnson, if they were accommodation acceptors. And if they had funds, they ought to have sued them and made the debt; good faith to Terry required this.

6. If Terry had been served with notice on the protest of the bill, the course taken by complainants in relation to the drawers would have released Terry, because of its being a violation of good faith, if they intended to look to him. Does not the same principle apply, and forbid their resorting to the mortgage which Terry had an interest in with them, to say the least in favor of his rights?

7. In answer to the argument of counsel for the complainants, that the answer of defendant, Terry, does not set out and show how much was due to him, it is replied that the bill does not charge that the other debts were paid. The pleadings and the mortgage show that four of the instalments were not due when the bill was filed, and indeed two of the instalments are not now due.

8. The complainants have at least acted in such disregard of the rights of Terry, in the indulgence of their kind and benevolent feelings for the debtors, Sterling and Johnson, as to forbid their expecting the chancellor to require Terry to bear with them the loss which has been sustained by the surrender of the securities which they had.

9. There is no order in the record appointing the *guardian ad litem*, to answer for the infant defendants.

Digitized by Google

A. C. Baine, on same side, contended:

1. That the complainants wholly failed by the proof to sustain the allegation in their bill as to their right to the bill of exchange; the allegation of the bill was denied by the answer of Terry, and there was no proof of the mode by which the complainants acquired the bill in the record. The want of correspondence between the *allegata* and *probata*, was an obstacle in the way of their getting a decree, which they would not be allowed to surmount by resorting to the fallacy of "shifting their ground."

2. That the equity of the assignee to foreclose the mortgage was itself a creature of equity; and the chancery court having no jurisdiction, territorial or otherwise, of transactions in Louisiana, it would not undertake to declare the effect of contracts made there, from respect both to its own character and that of the foreign state. Civ. Code, Art. 3280, p. 498; 11 Louisiana R. 28.

3. That the equitable right to foreclose a mortgage was not assignable indefinitely; that it was a mere equitable right, an equitable lien in the assignor, which passed with the first assignment, but could go no further; and could not be retained in the assignor for the benefit of the remote assignee. 1 Bland Ch. R. 522; 1 Paige Ch. R. 506.

4. That the assignment of the mortgage went with the assignment of the debt, as an incident to it; that the mortgage was not of greater compass or legal energy than what is derived as an auxiliary of the principal contract of indorsement; and if the assignor was discharged for want of notice from the legal liability of his indorsement, so also was the mortgaged property discharged, falling as it would, with the debt. 12 Louisiana R. 392; 9 Ibid. 335; 7 Ibid. 307.

5. That the bill was demurrable, because 1st, it did not pray that the residue of the indebtedness secured by the mortgage to Terry, which was not yet all of it due, might be foreclosed and reduced for a *pro rata* dividend. 1 Paige Ch. R. 557; and 2d, because the bill did not aver notice of the protest to Terry, the assignor, and that the right in the assignee to avail himself of

Digitized by Google

the mortgage was dependent upon first fixing the liability of the assignor.

6. That the complainants had been guilty of gross negligence or of fraud, in discharging the boat and releasing the notes; either of which would make them responsible. That they had in their hands the means of discharging the debt due them, and voluntarily relinquished it, which worked a discharge of the debt claimed by them, so far as it affects the rights of others. 1 S. & M. 105–108; 1 Sto. Eq. 232, § 326; 2 Swanst. 185; 4 Johns. Ch. R. 123; 1 Con. Eng. Ch. R. 543; 2 Brown's Ch. R. 579; 2 Sto. Eq. 171, § 883; 9 Wheat. 680.

7. That the effect of the judicial seizure of the boat was to transfer to the complainants the right to the boat, which was *pro tanto* a payment of so much of the plaintiff's debt, and their subsequent release of the boat was a release of their debt. 13 Johns. R. 517; *Oldham* v. *Ledbetter*, 1 How. R. 48; *Redus* v. *Wofford*, 4 S. & M. 579.

8. It is discretionary with equity, whether it will relieve the complainants, even if they establish a right. 2 Sto. Eq. 79, § 769; *King* v. *Hamilton*, 4 Peters, 328; *Cathcart* v. *Robeson*, 5 Peters, 264; 2 Sto. Eq. 52, § 750.

9. That the boat, the property of Sterling, by the judgment against him, became subject to the judgment in favor of the complainants, and their discharging it from the lien of the judgment, operated as a release of the judgment, so far as it affects the rights of others.

Sheppard, for appellees.

1. Terry, in his cross-bill admits that the bill of exchange was indorsed to Yeatman, Woods & Co. The answer of Sterling admits the same fact, and their bill is fully established by all the proof in the cause.

2. The assignment of the debt carries with it the mortgage security. The mortgage is a mere incident which secures the debt, in the hands of any holder. *Jackson* v. *Blodget*, 5 Cow. R. 206; *Green* v. *Hart*, 1 J. R. 590.

3. The only bar to the relief disclosed by the pleadings, is

Digitized by Google

that charged in the answer and cross-bill of Terry, the mortgagee, that the debt had been paid by Sterling & Johnson. This charge is denied by the answers of complainants, and their answer is sustained by the admissions of the answers of Sterling, the mortgagor.

The act passed before the notary, conveying the steamboat Choc-chu-ma, is shown by the agreement in writing of the parties of same date, to have been only designed as collateral security.

Equity regards the intention of the parties, and will give it full effect, no matter what form their contract may assume. *Kent* v. *Allbutian*, 4 How. R. 322; 2 Story's Eq. 283.

By a subsequent arrangement the Choc-chu-ma was reconveyed to Stirling, in consideration that he had substituted other security for the payment of the bill. This security consisted of claims put in the hands of William Beal, which, as shown by the proof, were productive of no benefit to complainants.

And, subsequent to these arrangements, it is shown by transcripts of the records, that judgment was obtained against the mortgagors, Sterling and Johnson, in the district court of the state of Louisiana, on the bill of exchange, which conclusively establishes against them the existence of the debt, for the payment of which they pledged the mortgaged property. And the court below did not err in decreeing a foreclosure and sale of their property for the payment of the debt.

It is shown that Terry was discharged as indorser, and he could not, therefore, ever resort to any securities which might have been taken by complainants, for in every case such right is based upon a personal liability of the party who claims to be substituted. No case can be found of such substitution, unless the party seeking it is either liable, or has paid the debt.

The levy of the attachment was not a satisfaction, as it is shown that it was discharged by the agreement and consent of the defendant, who alone could have insisted on it as a payment.

All the securities were taken after the discharge of the indorser, and were pursued with the utmost diligence by the complainants.

Digitized by Google

Mr. Justice CLAYTON delivered the opinion of the court.

It is now conclusively settled that the assignment of a note, secured by mortgage, carries the benefit of the mortgage along with it, to the assignee. *Evertson* v. *Booth*, 19 Johns.

This being so, there is but one question in the cause, whether the complainants, the appellees, by their acts or conduct have lost their right to resort to the mortgage for payment of the note assigned to them. The contest is between the holders of the assigned note and the original mortgagor, who assigned it to them, and who holds other notes secured by the same mortgage.

It is not necessary to decide whether the indorser is personally discharged; the question is, whether the property, which was devoted by the mortgage to the payment of the note, has been released. If the complainants had been entirely passive, and taken no steps for the collection of their debt, there would have been no pretext for saying that the mortgaged estate was released. Is the case at all different, when they have used active efforts of diligence, and those efforts have been unavailing?

It is insisted that they once had the debtor in custody, under arrest, and discharged him, and that they thereby discharged the mortgaged estate. This principle only applies where the arrest has been under final process. The levy of the *ca. sa.* is regarded as a satisfaction of the execution, and the release of the body by the creditor prevents his resort to any other means to enforce the collection. But here the debtor was only in custody under mesne process, and he was discharged through the clemency of the complainants, because of his inability to give bail. We do not see that this can affect the mortgaged property.

Again, it is insisted that, as the complainants received the pledge of a steamboat as collateral security when they released the body, and afterwards exchanged the boat with the debtor, for certain promissory notes, also as collateral, which proved worthless, that they thereby released the mortgaged estate. If a man have two separate securities for a debt, he may resort to either

Digitized by Google

for payment; he may release one, without affecting his right to the other. It is true, that if another person has a lien on one of the securities, he may file a bill to have them marshalled, and compel the creditor who has the two, to resort to the one on which there is no other incumbrance, and exhaust that, before he comes upon the one on which there is a joint claim. *Aldrich* v. *Cooper*, 8 Ves. 381; 19 Johns. 493. But if no such bill has been filed, nor any steps taken to compel the creditor having two securities to take such course, we are not aware of any principle which will deprive him of one, because he has not made the other available.

Another objection is, that the bill had been transferred by the complainants to a bank in New Orleans; and that they had taken it up after it had been protested for non-payment. The indorsement to the bank was a new, distinct, and independent contract. The payment to the bank was not a discharge of the bill, but of the contract of indorsement. Upon its payment the complainants again become the holders of the bill, and restored to their original situation. Bayley on Bills, 142; *Callow* v. *Lawrence*, 3 M. & S. 95.

There is nothing in the pleadings or the proofs to show, that the mortgaged estate is insufficient to pay all the claims upon it; consequently there is no room for the consideration of the point pressed in argument, that all the bills and notes secured by the mortgage, should be equally and ratably paid. It has been decided by this court, that all debts secured by mortgage or deed of trust, due at the time the bill is filed to foreclose, or at the time of sale under the deed of trust, should be paid *pro rata*, out of the estate, if insufficient to pay the whole. *Parker* v. *Mercer*, 6 How. 320; *Cage, Executor* v. *Iler*, MS. But as the state of facts disclosed in this record does not give rise to the question, and as there is no proof to show that the estate is not fully sufficient to meet all the incumbrances upon it, we cannot, upon a mere suggestion of counsel, reverse the decree.

Decree affirmed.

Digitized by Google

ELIAS WALLACE et al. *vs.* DAVID R. WINGATE, Administrator of Jourdan Morgan, deceased.

Where an issue has been made up in the probate court and sent to the circuit court for trial before a jury, upon the rendition of the verdict, the issue must be sent back to the probate court for judgment; and if the circuit court undertake to render a judgment upon such verdict, that judgment will be a nullity.

Where a circuit court has rendered a judgment upon a verdict on an issue from the probate court, no appeal or writ of error will lie from such judgment, it being a nullity; and if one be prosecuted it will be dismissed.

If the probate court, after the trial of an issue from it in the circuit court, refuse to grant a new trial, the whole proceedings may be brought up to the high court of errors and appeals, for revision in all their parts.

IN error from the circuit court of Hancock county; Hon. Van Tromp Crawford, judge.

At the September term, 1843, of the probate court of Hancock county, an issue was made up and directed to the circuit court of that county, to ascertain if Elias Wallace and others were the legal heirs and distributees of Jourdan Morgan's estate; they asserting that they were, while David R. Wingate, the administrator of the estate, denied it.

It is not deemed necessary, to the proper understanding of the decision of the court, to detail the facts developed on the trial of the issue in the circuit court. The jury determined that the plaintiffs in the issue were not the legal heirs and distributees of Jourdan Morgan's estate; upon which the circuit court adjudged that they take nothing by their issue, and that Wingate should recover his costs and charges in that behalf expended as adjudged, and that he go thence without day.

From this judgment of the circuit court, Wallis and others, the plaintiffs, prayed and prosecuted this writ of error, and at the present term of this court, Wingate, the administrator, moved to dismiss the writ of error for want of jurisdiction.

Digitized by Google

Montgomery and *Boyd*, for the motion.

The writ of error in this case is to the circuit court of Hancock county. The proceedings there were all connected with the trial of an issue, directed to that court by the probate court of the county, according to the provisions of the 18th section of the probate act, H. & H. Dig. 472. The issue is set forth on the first page of the record, and the petition and answer upon which it was ordered, are immediately after, and continue to the fifth page. The question submitted was, whether the petitioners, Wallace and others, were the heirs at law of Jourdan Morgan, deceased. The object of the petitioners was, on establishing their heirship, to compel a distribution of the estate of their ancestor, which was then in the hands of Wingate, the defendant, and to remove him from his office of administrator. It will thus be seen that the proceedings in the circuit court were merely interlocutory, and could not, in the nature of things, have any *final* character about them. That there could be no judgment of the circuit court, in such a case, either final or otherwise, is apparent from the language of the section quoted. The proceedings in that court end with the verdict, and the judgment or decree "on this finding of the jury," or verdict, is expressly directed to be given by the orphan's court. The rendering of a final judgment by the circuit court would of itself be an error, for want of jurisdiction in that court. The final proceedings are of a testamentary character, and appertain to the orphan's court alone. It is clear, then, there could be no appeal or writ of error till the action of the probate court, upon the return of the verdict certified back by the circuit court. The proceedings being interlocutory in the circuit court, the judgment could not be final. It is true there is the appearance of an attempt to enter a judgment by the circuit court in this case. On the fifth page of the record, after the return of the verdict by the jury, the court proceed to say, "it is considered by the court that complainants take nothing by their issue," &c.

But this can hardly be called a judgment; at all events it is not a final judgment. Neither party could take anything by their issue. H. &. H. 538, sec. 40. If, however, it was intended

Digitized by Google

to refer back to the petition, it will be regarded as a matter *coram non judice*, and mere surplusage in the record, or, at least, but the expression of an opinion by the judge, that he concurred in the finding of the jury.

The errors complained of in the different bills of exceptions are not now noticed. This court can never reach them, till there has been some final action in the probate court. The reversal of this supposed judgment of the circuit court, would not affect the verdict of the jury in any way. That would remain to be certified into the probate court, and the errors preceding it, to which the complainants object, can only be the subject of consideration here, where the original proceedings, of which they are but a part, are consummated by a judgment or decree of that court.

Mr. Justice CLAYTON delivered the opinion of the court.

This was a motion to dismiss for want of jurisdiction. An issue was made up in the probate court of Hancock county, and sent to the circuit court for trial. After the verdict had been rendered in the circuit court, that court gave a judgment in accordance therewith, in favor of the administrator, that he go hence without day, and recover costs. By the statute the judgment upon the verdict must be rendered by the probate court, H. & H. 472, sec. 18; and the judgment of the circuit court is a nullity, because not in accordance with the power entrusted to it by the statute in this sort of case. The power and duty of the circuit court were to certify the finding of the jury upon the issue, to the probate court, that judgment might be rendered in that tribunal. As no judgment could properly be pronounced in the circuit court, for lack of jurisdiction, the writ of error gives no jurisdiction to this court, and the cause must be stricken from the docket.

The effect of this will be, that the parties will stand precisely as they did when the verdict of the jury was rendered. The verdict must be certified to the probate court, when and where an application may be made for a new trial. *Apthorp* v. *Comstock*, 2 Paige, 487. *Barker* v. *Ray et al*, 3 Con. Eng. Ch. R.

Digitized by Google

63; 2 Rob. Prac. 356. If refused, and the case be finally disposed of, the whole proceedings may be brought up to this court for revision in all their parts.

Motion sustained and cause stricken from docket.

Digitized by Google

EZEKIEL LAND et al. *vs.* NATHAN WARNER, President of the Board of Trustees of School and School Lands in Township number Three, of Range number Thirteen, East.

E. and others made a note payable to E., president of the board of trustees in township three, of range thirteen, east, and his successors in office. W., as president of the board of trustees of schools and school lands of township number three, of range number thirteen, east, brought an action on this note against E. and others, and averred in the declaration, that by the description of the payee in the note, was intended "President of the board of schools and school lands, of township three, of range thirteen, east;" and that the plaintiff was successor of E. in that office; the declaration was held on demurrer to be sufficient to entitle W. to maintain the action.

IN error from the circuit court of Jasper county; Hon. Henry Mounger, judge.

Nathan Warner filed the following declaration in the circuit court, viz.:

"Nathan Warner, president of the board of trustees of schools and school land, in township number three, of range number thirteen, east, and the successor in office to Ezekiel Land, former president of said board, by attorneys complains of Ezekiel Land, Joshua Terral and James S. Terral, being in custody, &c. of a plea of trespass on the case on promises. For that whereas the said defendants heretofore, to wit, on the fifth day of August, A. D. 1841, in the county aforesaid, made their certain joint and several promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay Ezekiel Land, president of the board of trustees in township three, of range thirteen, east, (meaning Ezekiel Land, president of the board of trustees of school and school land in township number three, of range number thirteen, east,) or his successor in office, twelve months after date, one thousand one hundred and ninety-six dollars, for value received, bearing ten

Digitized by Google

per cent. interest per annum until paid, and then and there delivered the said note to the said Ezekiel Land, president as aforesaid; and the said Ezekiel Land, to whom the payment of the said sum of money, in said note was to be made, before the payment of the same on, &c., at, &c., delivered the said note to the plaintiff, president as aforesaid, and successor in office to him, the said Ezekiel Land, former president of said board of trustees as aforesaid, by means," &c. The declaration contains also a count stated in the ordinary form, and concluded with the following breach, viz.: "Yet the said defendants, not regarding their said several promises and undertakings, have not as yet paid the said sums of money, in said note and last-mentioned count specified, or either or any part thereof to the said plaintiff, president as aforesaid; but to pay the same have hitherto wholly neglected and refused," &c.

To this declaration the defendants filed a special demurrer, that it appeared by the declaration, that the note was payable to Ezekiel Land, president of the board of trustees of township three, of range thirteen, east, and it did not appear thereby that Land ever indorsed the note to the plaintiff; or that the note was payable to any person who could assign the same so as to enable the assignee to sue in his own name without indorsement; or that the note was payable to any person who had by law a successor in office.

The court below overruled the demurrer — the plaintiff entered a *nolle prosequi* on the second count; the defendant failed to plead, and the court rendered judgment final by default for the plaintiff; upon which, the defendants sued out this writ of error.

W. Yerger, for plaintiff in error.

The rule of law is well settled, that no person but the party in whom the legal title to a promissory note is vested, can sue at law; and no action can be maintained upon a note in any name but that of the payee or his indorser, unless in a note payable to A. or bearer.

Where a party seeks to change this common law rule by vir-

Digitized by Google

tue of a statute, he must show a compliance with the statute, else the action cannot be maintained. 4 Yerg. 156.

J. Heyfuon, on the same side.

1. It does not appear that the board, of which plaintiff is president, exists in this state. The court cannot judicially know that township number three, of range thirteen, east, is in the state of Mississippi, there being a township of a corresponding description in an adjoining state, and by consequence it is unknown to the court, whether or not the instrument declared upon could be transferred, by mere delivery, so as to enable the plaintiff to sue in his own name.

2. It appears *prima facie* on the face of the declaration, that Ezekiel Land, one of the defendants, is the payee of the note declared upon. This necessarily results from that rule in pleading, that the construction shall always be against the pleader. And also from another rule, that identity of name is *prima facie* evidence of the identity of person. 1 Chitty on Pl. 450.

3. There is a patent ambiguity in the instrument declared upon, which prevents a recovery at law by plaintiff in his own name, unless he becomes indorsee. The instrument, according to the declaration, is payable to Ezekiel Land, president of the board of trustees, in township three, of range thirteen, east. That there is an ambiguity in the description of the payee's official character cannot be doubted; the words "schools and school lands" must be supplied either by legal construction or by extrinsic evidence. Now to determine the kind of ambiguity that exists, the question is, is it raised by extrinsic facts, or is it indefinite and equally capable of different constructions and applications? That it is not raised by extrinsic facts is clear, because we perceive it without any comparison, and that it is indefinite and equally capable of different constructions and applications, is likewise evident. The words "board of trustees in township three, of range thirteen, east," may be construed to mean any board of trustees in that township, or they may be applied to any of them. The ambiguity is therefore patent, which is never helped by averments, and therefore the demurrer

Digitized by Google

does not confess the averments in the declaration, made for the purpose of explaining the ambiguity. But it may be asked, do we contend that the note declared upon is void by reason of the uncertainty? We do not; we simply insist that the description of his official character is void by reason of the patent ambiguity in the same. And therefore, that the note is payable to Ezekie Land, and the plaintiff not being his indorsee, cannot recover in his own name. The point for which we contend is embraced in the case in 1 How. 198.

4. The declaration discloses the fact, that the instrument declared upon is usurious on its face, expressing ten per cent. interest, and not expressing that it was reserved for a *bona fide* oan of money, notwithstanding which, plaintiff took judgment for the principal and interest thereon, at ten per cent. When the declaration discloses on its face a usurious contract, it is properly reached by demurrer. It would be useless, if not absurd, to plead a fact which the plaintiff admits. And inasmuch as he claims judgment according to the tenor of the instrument, which is contrary to its legal effect, the demurrer on this ground should have been sustained, because it appears on the record that the instrument is misstated, according to its legal effect, and this is fatal on demurrer. 2 Saun. 97.

5. Plaintiff does not show in his declaration that a transfer of the note was made to him; he says it was delivered. The mere delivery of a note is not a legal transfer. The bearer of a note payable to bearer, must aver that a transfer was made. Chitty on Bills, 359. And a successor in office should likewise show a transfer.

6. The breach in the declaration is defective, not being in the disjunctive, according to the contract. In action by assignee, on a contract in the disjunctive, the breach should be in the disjunctive. 1 Chitty on Pl. 367.

G. Calhoon, for defendant in error.

There can be no doubt, I think, of the propriety of the decision of the court below, in overruling the demurrer of the plaintiff in error and awarding judgment against him.

Digitized by Google

The note is made payable to E. Land, president of the board of trustees, in township three, range thirteen east, or his successor in office. Now the law provides for the creation of, and the courts will officially recognize, one, and but one, board of trustees in that township, and that is the board of trustees of schools and school lands; and I take it to be clear, that if the trustees were authorized to purchase lands, that they could even take by grant, by the above description. "Purchases are good in many cases by a known name, or by a certain description of the person without either surname or name of baptism, as the wife of J. S." &c. Co. Litt. 3, b. So a person may take by grant by a wrong name, provided the grant contains anything by which he can be identified; "as if lands be given to Robert, earl of Pembroke, when his name is Henry," &c. Ibid. 3, a. The note in this case certainly contains enough to show the official character of the payee; if so it passed to his successor, and no assignment was necessary to vest in him the title to it. But if there was any doubt as to this fact, the plaintiff in error has been kind enough to remove it by the confession arising from his demurrer.

But the case of *Conner et al* v. *Ruth*, 7 How. and the authorities there cited, settle this question. The case of *Kencannon* v. *Carroll, Gov. &c.* 9 Yer. R. 11, is in point. Upon the principles laid down in these cases, the court, it is believed, will supply the words of "school and school lands," omitted in the note in this case.

In another view there can be no doubt, it seems to me, on this subject. If there is an ambiguity in the note, it is not a patent ambiguity relating to the terms or subject-matter of the undertaking; all this is plain; it was to pay the money; it is at farthest, but a latent ambiguity, relating to the character of the payee, which can be explained by averment and parol proof. See *Breckenridge and wife* v. *Duncan*, 2 Marsh. R. 50.

In the case of *Jackson ex dem. Dickson et al.* v. *Stanley*, 10 Johns. R. 133, it was held that where a patent was to David Hungerford, when the name was in fact Daniel Hungerford, it was a latent ambiguity which could be explained by parol proof.

Digitized by Google

If such mistake, in case of a grant can be explained, *a fortiori* can it be explained in a promissory note.

Mr. Justice THACHER delivered the opinion of the court.

This was an action of assumpsit instituted in the circuit court of Jasper county.

Nathan Warner, the president of the board of trustees of schools and school land, in township number three, of range number thirteen, east, and the successor in office of Ezekiel Land, a former president of said board, instituted an action upon a promissory note payable to Ezekiel Land, president of the board of trustees in township three, of range thirteen, east, or his successor in office. The declaration avers that by the description of the payee of the note was meant Ezekiel Land, president of the board of trustees of schools and school land, in township number three, of range number thirteen, east, or his successor in office. A demurrer was filed to this declaration, assigning for cause that it does not appear thereby that said Ezekiel Land indorsed the note sued on to the plaintiff in the action, nor that the note was payable to any person who could assign the same so as to enable the assignee to sue in his own name, nor that the note was payable to no person who has by law a successor in office. This demurrer was overruled, and the defendants below declining to plead over, judgment was rendered for the defendants in error.

The only question which can arise in this case, is whether the description of the payee could properly be supplied by averments in the declaration. The description alone seems certain and without ambiguity, that is to say, there is nothing in it that renders its apparent meaning doubtful. If there be any ambiguity, it arises from collateral matter out of the instrument. 1 Sug. on Vend. 181. The ambiguity lies hidden in the character of the person of the payee, and the averment shows that it can, if questioned, be dissolved by extrinsic evidence. *Storer* v. *Freeman*, 6 Mass. 440; *Webster* v. *Atkinson*, 4 New Hamp. 21; *Peisch* v. *Dickson*, 1 Mason, 10.

Judgment affirmed.

Digitized by Google

JOHN WOODHOUSE et al., Administrators of A. Martin, deceased, *vs.* ANN LEE.

L. sued S. & H. and P. & M. upon a joint note; M. died during the progress of the suit, and before judgment; whereupon L., having brought the administrators of M. before the court by *scire facias*, dismissed the suit as against the other parties, and took judgment against the administrators of M.: *Held*, that the proceedings were regular and proper.

A plaintiff in an action upon a joint note may discontinue the suit as to any one or more of the defendants, and proceed to judgment against the others.

Where a party defendant who has pleaded to the action, dies during the progress of the suit, and his administrators are brought in by *scire facias*, the plea filed during the lifetime of the intestate will be the plea of the administrators, if they omit to file a plea to the *scire facias*.

IN error, from the Jefferson Circuit Court; Hon. Charles C. Cage, judge.

Ann Lee sued in assumpsit in the court below, to its November term, 1839, the makers of the following note:

$3882,20 *Rodney, Miss. May* 3, 1838.

Twelve months after date, we, or either of us, promise to pay Messrs. Stuart & Smith, three thousand eight hundred and eighty-two $\frac{20}{100}$ dollars, for value received, payable and negotiable in the Commercial Bank of Rodney.

SMITH & HENRY,
JOHN WOODHOUSE,
ALEXANDER MARTIN.

Indorsed
STUART & SMITH.

At the return term the defendants all appeared, and plead the general issue.

At the November term, 1840, the death of the defendant Martin, was suggested, and a rule to revive the suit against his personal representatives entered; a *scire facias* issued accord-

Digitized by Google

ingly, and in March, 1841, was executed on John Woodhouse and Richard Valentine, as the administrators of Martin. The cause was continued until May, 1842, when it was called for trial, and the suit discontinued as to Smith & Henry, and was revived against Woodhouse and Valentine, as administrators of Martin, and submitted to a jury to pass upon the issue joined; who found a verdict for the plaintiff for $4813,91 against the administrators, and the court below gave judgment accordingly. Whereupon the defendants in the judgment prayed and prosecute this writ of error.

John B. Coleman, for plaintiffs in error.

1. We contend that it was error in the court below, to allow the plaintiff to discontinue as to the surviving makers of the promissory note, and to revive and take judgment against the representatives of the deceased one.

By our statute, all bonds, bills, notes, &c., executed by two or more, are made "to have the same effect in law, as if they were joint and several." H. & H. 578, sec. 9.

What is the effect in law, of a joint and several contract? We understand it to be that the payee or obligee may at his option treat it either as joint, and sue all the makers or obligors, or as several, and sue but one of them. When, however, he has made his election, we apprehend that he is concluded by it, and that the rules of law applicable to the particular class of contracts in which he has thus elected to place it, must exclusively govern its construction, and control the remedies for its enforcement. If he chooses to treat it as a joint contract, it becomes at once subject to the law which governs joint contracts; if as a several contract, then it is controlled by the law applicable to several contracts. In this case, the plaintiff made her election to treat the contract as a joint one, and evidenced her election by bringing suit against all the makers of the promissory note jointly.

The rule of law is well settled, that where in a suit against several defendants upon a joint contract or liability, one of them dies before judgment, his death must be suggested, an abate-

Digitized by Google

ment entered as to him, and the suit progress against the surviving defendants. Tidd's Prac. 1028; 1 Burr. 363; 2 Saund. R. 27, g. n. 4; 5 Term R. 577.

2. The rule was taken to revise, and a *scire facias* issued against the administrators of Martin, under which they were brought into court, whilst the suit was still pending against the surviving makers of the promissory note. As well, it seems to us, might the plaintiff have instituted an original suit jointly against the surviving obligors or makers, and the representatives of a deceased one. Even if it were competent for the plaintiff to have proceeded under any circumstances, in this suit against the representatives of Martin, it surely was error to make them parties, and bring them into court before a discontinuance had been entered as to the survivors. Carth. 171; 2 Lev. 228; 1 Chit. Pl. 37; Gould, 207.

3. The administrators did not plead to the *scire facias*. After the suit had been discontinued as to the survivors, there was no issue to be tried; the case was nevertheless submitted to a jury. That this was error, has been settled by this court. 1 S. & M. 662; 2 Ib. 307.

Thrasher and *Sillers*, for defendant in error.

The exact nature and extent of a discontinuance or *nolle prosequi* in civil cases, does not seem to have been accurately defined and ascertained, until modern times. The authorities upon this subject in the old books, are contradictory and confused. See 1 Saund. R. 207, n. 2.

The statutes of this state, however, change the rule of the common law, and leave no doubt of the correctness of the judgment under consideration. In case of the death of one or more joint obligor or obligors, say the statute, "the joint debt or contract shall and may survive against the heirs, executors and administrators of the deceased obligor or obligors, as well as against the survivor or survivors." H. & H. 578, s. 8. All promissory notes are made joint and several by statute; see H. & H. 578, s. 9; and in an action against several makers, the plaintiff may discontinue as to some of the parties, and

Digitized by Google

take judgment against the others. *Lynch* v. *Commissioners of the Sinking Fund*, 4 How. R. 377.

When any suit or action shall be depending in any of the courts of this state, and either of the parties shall die before final judgment, the language of the statute is; "that the executor or administrator of such deceased party, either plaintiff or defendant, shall have full power (in case the cause of action by law survive) to prosecute or defend such suit or action to final judgment; and the defendant is hereby obliged to answer thereto accordingly." H. & H. 584, s. 29.

The above recited statute, is almost a literal copy of the act of 1789, of the state of Tennessee, on the same subject; and the supreme court of that state, in the case of *Simpson et als.* v. *Young et al.* 2 Humph. R. 534, decided that a joint action would lie against a surviving partner and the representatives of the deceased partner. The question before the court, was whether a joint action could be brought against the surviving partner of a partnership concern, and the representative of a deceased partner. The act of 1789, ch. 57, sec. 5, say the court, "provides that a joint debt or contract shall survive against the representatives of a deceased obligor, and that in all cases of joint obligors, or assumptions of copartners or others, suits may be brought, and prosecuted on the same, in the same manner as if such obligations and assumptions were joint and several."

"Moreover," say the court, "our practice is fixed and universal on the subject; and suits are constantly brought, and without question from any quarter, against the surviving obligor or partner, and the representative of the deceased; and judgments given against the one, *de bonis propriis*, and against the other *de bonis testatoris*."

This decision, which seems to be a literal interpretation of the Tennessee statute, and the dictates of common sense, not only settles the question in favor of the judgment under consideration, but goes beyond it, and decides more than is necessary to sustain the judgment before the court. But even if it was incorrect to discontinue against the surviving obligors, and to

Digitized by Google

revive against the administrators of the deceased, yet our statute of jeofails would remedy the defect. The statute declares, that no judgment, after the verdict of twelve men, shall be reversed, for any mispleading, insufficient pleading, discontinuance, misjoinder of issues, &c. H. & H. 591, sec. 11. The case of *McAfee* v. *Patterson et al.* 2 S. & M. 593, is an adjudication upon this point. The administrators of Alexander Martin, deceased, not only submitted the case to the jury without exception at the time, upon the pleas formerly pleaded for Martin, but continued the cause one term, as an affidavit after the service of the writ of *scire facias*. *Henderson* v. *Talbert*, 5 S. & M. 109.

Per Curiam. The defendant in error sued four persons as makers of a promissory note; pending the suit, one of the defendants died; the plaintiff dismissed as to all of the surviving defendants, having first brought in the administrators by *scire facias*, and proceeded to judgment against the administrators of the deceased defendant, and this is assigned as error.

In the case of *Henderson et al.* v. *Talbert*, 5 S. & M. 109, we held that where one of three makers of a writing obligatory died pending the suit, the plaintiff might proceed against his administrators conjointly with the surviving defendants. That case seems to settle the principle of this. If the plaintiff may proceed against the administrators, he may dismiss as to any of the parties. They are but joint defendants. The argument that as the party elected to treat the note joint only by suing all the parties, and must so continue the suit against the survivors, after suggesting the death of one defendant, seems to be opposed by the statutes. All notes were joint and several. This provision was changed by the act of 1831, which authorized the holder to sue any one or more of the makers. H. & H. Dig. 594, sec. 28. All contracts of partners are declared joint and several. Ib. 596, sec. 29, 30. The 34th section provides, that if a drawer, &c. shall have died before suit brought, a separate suit may be brought against his representatives; and the 40th section provides, that a plaintiff may have the right to discontinue

Digitized by Google

his suit against any indorser or surety. These statutes enlarge the plaintiff's privilege to the utmost extent, and seem to be sufficiently comprehensive to embrace the case at bar.

Another error assigned is, that there was no issue as against these defendants. All of the defendants had pleaded *non assumpsit* and payment, on which pleas issues were taken; these were the pleas of the intestate, and of course the pleas of the administrators. That they did not plead to the *scire facias* is a matter of no consequence; that was mere process to bring them into court to defend the original action; and it is to be presumed they had no answer to make to it which would defeat the action.

Judgment affirmed.

Digitized by Google

RICHARDSON D. RANSOM *vs.* WILLIAM COTHRAN et al.

Where an attorney at law was sued for damages occasioned by his failure to sue one of the parties to a note placed in his hands for collection, it will be a good plea in bar of the action, that the attorney at law sued one of the makers of the note in due course of law, and recovered a judgment against him, which bound a sufficient amount of unincumbered property to pay the debt, and that satisfaction would have been obtained of the judgment, but that the plaintiff, by his own act, surrendered up and vacated it.

Where a declaration against an attorney at law for neglect in suing upon a claim placed in his hands for collection, contains several counts, in some of which the claim is described as a promissory note, in others as a writing obligatory, and the defendant's plea to the whole action, in other respects formal and containing a good bar to the action, will not be defective for describing the claim as a writing obligatory.

IN error, from the Carroll circuit court; Hon. Benjamin F. Caruthers, judge.

Richardson D. Ransom sued William Cothran and Galbraith F. Neill, attorneys at law, practising in partnership, in an action of assumpsit. It will be requisite, to the proper understanding of the case, to state at some length the pleadings.

There were four counts in the declaration.

The first count alleged a retainer by the plaintiff of the defendants to collect a promissory note, evidenced by their receipt, in these words:

"Received of R. D. Ransom, for collection, a promissory note, drawn by A. J. Alesworth and Joseph Parmalee, the 9th of August, 1836, and payable to Granberry Blount, or order, on the 1st of January, 1839, for twelve hundred and fifty dollars. February 13, 1839. COTHRAN & NEILL."

That they did not use due skill and diligence in the collec-

Digitized by Google

tion of the debt, and that the plaintiff had not only been hindered and delayed, but was likely to lose the same.

The first plea of the defendants was to that count. It admited the retainer. Stated that Parmalee, one of the obligors, was dead at the time of the retainer. That at the first count thereafter, they impleaded Alesworth, the principal obligor, to judgment, and, immediately after the judgment, the plaintiff abstracted from the files of papers in the cause, the note, and had kept possession of it ever since. That at the time of the withdrawal of the note, Lydia Parmalee was administratrix of Joseph Parmalee, and had, at the time of the withdrawal of the note, on the 31st January, 1840, and since, and now has sufficient assets to pay the same.

The second count alleged a retainer to sue Lydia Parmalee, administratrix of Joseph Parmalee, set out the same receipt, and alleged that the defendants did not commence or prosecute a suit at all, by which means he was likely to lose the debt, and had lost it.

The plea to that cou:t, except as to nominal damages and costs, was, that the retainer in that court was not to prosecute a suit alone against Lydia Parmalee, but also at the same time, one to sue Alesworth, the principal, and surviving obligor; and that they did promptly sue and prosecute him to judgment, at the first term, and immediately thereafter the plaintiff abstracted from the files said note, where defendants had filed it, according to usage and custom, to wit, on the 31st January, 1840, and had ever since kept the same from defendants. And that when he took the note from the papers, Lydia Parmalee, administratrix, &c. had assets, and since has had, and now has, sufficient to pay the note.

The third count alleged a retainer generally, to collect the sum of twelve hundred dollars from Lydia Parmalee, administratrix of Joseph Parmalee, and that they failed to institute suit at all, by which he has been hindered and delayed, and was likely to lose his debt, and had lost it.

The plea to that count was to all of the count, except nominal

Digitized by Google

damages and costs, and alleged that the retainer in that court was to collect a writing obligatory, in these words:

"$1250. *Oxford, Miss. August* 9, 1836.

"On, or before the first day of January, 1839, we promise to pay Granbery Blount, or order, one thousand two hundred and fifty dollars, value received. Witness our hands and seals.

"A. J. ALESWORTH, (L. S.)

"JOSEPH PARMALEE." (L. S.)

And that the retainer was not to sue Lydia Parmalee alone, as administratrix, but to sue also Alesworth, the principal, and surviving obligor; and at the first term they did sue him, and obtain judgment and execution, and filed with the papers said note, according to custom and usage. That immediately after judgment, on the 31st January, 1840, the plaintiff took from the files said note, and has kept it ever since; and at the time he took it out, Lydia Parmalee, administratrix, had sufficient assets to pay it.

The fourth count alleged a retainer to collect a writing obligatory, in these words:

"$1250. *Oxford, Miss. August* 9, 1836.

"On or before the first day of January, 1839, we promise to pay Granbery Blount, or order, one thousand two hundred and fifty dollars, value received. Witness our hands and seals.

"A. J. ALESWORTH, (L. S.)

"JOSEPH PARMALEE." (L. S.)

Indorsed by Blount to plaintiff, by which defendants undertook with skill and diligence to prosecute a suit against Lydia Parmalee, administratrix, &c. and that defendants knew Joseph Parmalee was dead, and that Lydia was his administratrix. Yet they failed and neglected, and still neglect and refuse to prosecute, &c., by which he was likely to lose his debt, and had lost it.

Digitized by Google

To that count, the fourth plea, save as to nominal damages and costs, stated that it was not a retainer to sue Lydia, the administratrix, alone, but also to sue Alesworth, the principal and surviving obligor; and that at the first term they did faithfully and promptly sue to judgment and execution against Alesworth, and filed, according to usage, &c., the note with the papers; and that immediately thereafter, the plaintiff took from the papers the note filed, to wit, 31st January, 1840, and had kept and never returned it; and that Lydia Parmalee, administratrix, &c., had then and since, and now has, sufficient assets to pay the same.

The fifth plea was to the whole declaration, and alleges that all the counts are for the same cause of action, and, saving nominal costs and damages, says that it was to collect a writing, in the words, already set out. And that they did sue to judgment at the first term, Alesworth, the principal and surviving obligor, and that the other obligor was surety to Alesworth, and dead, and immediately after said judgment the plaintiff withdrew the retainer of defendants, and discharged them, and appointed other attorneys, and that when they were so discharged the said Lydia Parmalee, administratrix, &c., had sufficient assets to pay and discharge said writing, &c.

The sixth plea was also to the whole declaration, and alleged that the debt in the plaintiff's declaration, which they were retained to collect, was secured to be paid by a writing obligatory, made by Andrew J. Alesworth and Joseph Parmalee, for $1250, due 1st January, 1839, and that Alesworth was principal, and Parmalee only security on it; and averred that at the first term after their retainer they sued and recovered judgment in the circuit court of Madison against Alesworth, and at the time of the recovery Alesworth had in that county real and personal property, to the value of $5000, unincumbered, and without delay they had execution issued and levied on it, which was valued by appraisers to more than double the amount of the judgment; and the sale of it was delayed because it would not sell for two thirds of its value, and that they could and would have obtained satisfaction if the plaintiff had not em-

Digitized by Google

ployed other attorneys in whom he confided, to manage the same.

The seventh plea, also to the whole declaration, alleged that the debt in the declaration mentioned was secured to be paid by a writing obligatory, signed by Alesworth as principal, and Parmalee as security, and that at the first term they got judgment for debt, costs, and damages, against Alesworth, in Madison circuit court; that he had, at the recovery, $2000 worth of real, and $3000 worth of personal estate, bound by the lien of the judgment, unincumbered, and they could and would have obtained satisfaction, but that plaintiff by his act surrendered up and vacated said judgment.

The eighth plea alleged, as to second, third, and fourth counts, that plaintiff has not been injured by any laches of defendants, for Lydia Parmalee, administratrix, &c., has in her hands and possession, goods to be administered, &c., sufficient to pay said judgment, costs, damages, &c.

The ninth plea alleged that plaintiff has not sustained any damages by their laches, because the debt in the declaration, which is the same debt they were retained to collect, was secured to be paid by a writing obligatory, to which Alesworth was principal, and Parmalee but security, and at the time of the retainer Parmalee was dead, and at the first term of Madison circuit court, they prosecuted to judgment, for debt, damages, and costs, against Alesworth, and with diligence sued out execution, and the same has been levied on sufficient property to satisfy the same; and that said Alesworth has sufficient liable to be seized, and unincumbered, to satisfy it, &c.

To the first, second, third, fourth, fifth, and seventh pleas, a demurrer was filed; it is not deemed requisite to set out the causes thereof to any but the seventh plea; which were that that plea did not answer all the counts, though it professes it, and attempted to make an answer to but one count an answer to the whole. It was not an answer to any count in particular, and did not fully answer either count in the declaration. That it was argumentative, double, and amounted to the general issue.

Digitized by Google

Issues were tendered and taken on the sixth, eighth, and ninth pleas, when the court below sustained the demurrers to the first, second, third, fourth, and fifth pleas, but overruled the demurrer to the seventh plea, and awarded judgment final in favor of the defendants; from which order the plaintiff prosecuted this writ of error.

Waul, for plaintiff in error.

The plea seventhly pleaded is defective in all the essentials noticed by the causes of the demurrer.

It professes to answer all the counts in the declaration, when in fact it is an answer to none; nor does it offer an excuse for not suing Lydia Parmalee, according to the contract alleged in the second, third, and fourth counts, for though the facts set forth in the plea were formerly and properly pleaded, it certainly cannot excuse the defendants to say that they vacated a judgment against A. J. Alesworth by their own act; but the plea does not state what the act was that vacated the judgment, nor could they set forth any propriety that they might affect to suppose would make it their duty to sue A. J. Alesworth first, for Lydia Parmalee could not defend at law or in any manner defeat a recovery on the bill single, as they, Joseph Parmalee, her intestate, and Alesworth, appear to be principals, and it certainly shows more kindness than diligence to invent an unavailable defence for the administratrix. But had it been a valid defence, or were the parties not estopped from pleading it, there is no matter shown in the plea that rendered it proper or necessary to omit suing the administratrix.

It does not answer any count in particular, and is indeed but an answer to part of one count, namely, that although they contracted to sue two persons, yet they sued one, and were therefore released. And an answer to part of a count, although perfect as to that part, is no answer to the action. 8 Wend. 617; 20 Johns. 204; 2 Wend. 419; 2 How. 634.

The plea is argumentative and amounts to the general issue. It neither denies nor does it confess and avoid the cause of action, and is therefore bad. Stephen on Pl.

Digitized by Google

The plea does not deny the contract made as stated, but says that the debt, for the collection of which they were retained, was founded upon a certain claim different from the one declared on, and therefore they did not promise as declared on, but the claim they sued on and obtained judgment, was released by plaintiff, therefore they were released from the retainer in the plaintiff's declaration. Two defences, two syllogisms, with plausible but most uncertain and informal conclusions. *Welch* v. *Jameson*, 1 How. 161; Steph. 384.

If the matter set out in the plea is good at all, it amounts to the general issue, for it shows that the contract never existed in the form in which it is alleged, and is therefore an argumentative denial which is not allowed. 5 Ad. & El. (31 C. L. R. 309); Steph. on Plead. 419; Com. Dig. Pleader, E. 13, 14.

The want of certainty renders it impossible to take issue, or reply simply.

Sheppard, for defendants in error.

The only point presented by the record is the correctness of the judgment on the defendant's demurrer to seventh plea. For the defendants we insist that there was no error in overruling the demurrer.

1. The plea states various circumstances as matter of inducement, and giving color of action, but all tending to a single point, and tenders a single issue of fact that the defendants were prevented from collecting the debt by the act of the plaintiff in vacating the judgment, and on this point an issue might have been well taken by the replication; the plea therefore is not bad for duplicity; for if this fact had not been alleged, the plea would have been bad, and would have stated no matter to bar the action.

2. It does not amount to the general issue, as it does not put in issue, by its most material averment, a matter which the plaintiff would have been required to prove under the general issue. It is strictly a plea in avoidance, giving express color and avoiding the demand for damages.

The statute provides that the party may plead as many pleas

Digitized by Google

in bar, though they go to the party or character of the party suing. This is equivalent to saying that he may plead any matter specially, though it should amount to the general issue. H. & H. 597.

In an action against an attorney, say this court, in case of *Fitch* v. *Scott*, 3 How. R. 314, two grounds must concur to fix his liability. 1st. Negligence or laches. 2d. A consequent loss or damage to the party.

Any matter which would avoid or answer either of these grounds will be a good bar. If, for example, the claim or demand which the attorney is retained to collect is void or voidable for any cause in its inception, or for any matter arising subsequent, no action could be sustained against the attorney for failing to bring the action, for the party has sustained no damage. See Comyn on Contracts, tit. Attorney. *Godefroy* v. *Jay*, 20 Eng. Com. Law Rep. 183.

The gravamen of this action is the failure and neglect of the defendants to collect a debt of twelve hundred dollars, claimed to have been due him; this is fully answered and avoided by the plea, showing that they would have collected the debt, but were prevented by the act of the plaintiff in surrendering up and vacating a judgment obtained. The judgment should therefore be affirmed.

A. C. Baine, on the same side.

So far as the objection goes, to any of our pleas, that they amount to the general issue, I am at a loss to perceive what ground there is for it. Not one of them leaves the plaintiff to prove his original case. Many of them expressly admit the plaintiff's right to recover nominal damages and costs. And all of them confess the retainer, and admit that no suit was brought against Parmalee's administratrix; but avoid, by setting up affirmative matter, which we think, being admitted, precludes the plaintiff from recovering.

The note being taken from our possession is a fact which undoubtedly would preclude the plaintiff from recovering, for any

Digitized by Google

damages he sustained in consequence of our not bringing a suit after that time.

I wish this point distinctly presented, for upon its correct settlement hangs, as we think, a very important question.

Then, again, we say that the taking the note out of our possession was a discharge of any claim upon us, to bring any suit after that time. No matter what damages the plaintiff may have sustained after his resumption of the possession of the note, we are not accountable for them. He sustained them in consequence of his own neglect, not ours. And it is wholly immaterial whether he resumed possession of the note, with or without our consent. This being a just view of the case, what do the pleas allege in bar of any special damages, before the abstraction of the note from the files? The positive fact, that at that time the administratrix of Parmalee had ample assets, unadministered, to pay and satisfy the same. Then how was plaintiff damaged by our neglect? Clearly on these facts he was not damnified. And if there were some special facts, by which he was specially damaged, it was the duty of the plaintiff to have admitted those two facts in the pleas, and have avoided their force by bringing his special matter on the record, so as to show the court, not only the fact of actual, special damage, but that it legally resulted from our previous neglect. Because, I take it, it matters not what damage the plaintiff may in fact have sustained in this matter, so as such damage did not result from any neglect of ours. The pleas are certain to a common intent, which is all that is required in pleas in bar. To have made all the averments in the pleas that plaintiff deems necessary by his causes of demurrer, would have been to have made the pleas "certain to a certain intent in every particular," "which precludes all argument or presumption against the party pleading." It "is that technical accuracy which is not liable to the most subtle and scrupulous objection," and "is not only a rule of construction, but a rule of addition; for the party must not only state his facts in the most precise way, but add to them such facts as show they cannot be controverted, and as it were anticipate the cause of his ad-

Digitized by Google

versary." 1 Chit. Pl. 237, 238. This is the rule as to pleas in abatement, but not applicable to pleas in bar. This is precisely what these demurrers require of us — "to meet by anticipation every possible and subtle objection that the most scrupulous adversary might imagine. . . . Instead of leaving us where the law left us, namely, with liberty to omit such things as 'more properly' should come from the other side." "It is not necessary to state that which would come more properly from the other side." Stephens on Plead. 395; *Hotham* v. *East India Company*, 1 Term R. 638.

I think the case of *Godefroy* v. *Jay*, 7 Bing. 413, settles the merits of this whole controversy. The point there decided was this: "The defendant, an attorney, was sued for negligence in allowing judgment to go by default in an action which the plaintiff had retained him to defend; the negligence being proved, held it was for the attorney to defend himself, by showing, if he could, that the plaintiff had no defence, and so had not been damaged by the judgment by default." Now, though to some minds, at first blush, this might be deemed a case against us, yet I think it is the strongest possible case for us. To illustrate this, we must look at the aspect of the cause. The negligence here is admitted, not proved, as in the case cited.

After this admission, we do defend ourselves by pleading those facts in bar which shows the plaintiff sustained no special damage. Are they such facts as would warrant a jury to find a verdict for us? For I take it, that this is the true test to be applied to the sufficiency of facts plead in bar, when a demurrer is put in. If they are such facts as would warrant a jury to find for the party pleading, then certainly the facts are a sufficient bar; or if they were such facts as, if specially found by a jury, would be sufficient for the court to enter judgment on, would perhaps be a more correct way of expressing it. And perhaps a more correct mode still would be to test it by a demurrer to the evidence; then if the facts admitted, and such inferences as the court are authorized to draw from them, would authorize a judgment, certainly the demurrer is bad. And a demurrer to a plea containing facts in bar, always admits that

Digitized by Google

they can be proved at least, and for all substantial purposes admits them as true. Then if these facts, admitted here, be true, did the plaintiff sustain any damage by our alleged neglect? That is the question, and the plain question, to try here. And that depends upon two facts before alluded to. Were we discharged, or was the note taken away from us? And was this at a time when Lydia Parmalee, administratrix, had ample assets, and has she still ample assets, to pay plaintiff's debt?

This is the state of the case on the five first pleas, upon which the court gave judgment against us. In this I think the court erred.

But the seventh plea, upon the demurrer to which the court gave judgment for us, and which is now sought to be reversed, beyond all question was a good plea, and the judgment of the court ought to be affirmed. It alleges that with due diligence, judgment was obtained against Alesworth, the principal; that he had two thousand dollars' worth of real, and three thousand dollars' worth of personal property bound by it; and that the plaintiff, by his act, surrendered up and vacated said judgment. The only objection to this plea, that has the slightest pretence to a semblance of foundation is, that it is double. I certainly need not cite authorities to show this court that facts, however numerous, may be alleged in a plea, if they form a single ground of defence; nor that matter of inducement is not a matter of objection to a plea for duplicity; or that a plea is not argumentative, or does not amount to the general issue (for this is the same thing) that admits the plaintiff's cause of action, and by *affirmative* matter avoids it.

Mr. Justice CLAYTON delivered the opinion of the court.

The question in this case grows out of the demurrer of the plaintiff to the seventh plea of the defendants.

Several objections are urged to this plea — that it purports to be an answer to the whole declaration, but is an answer only to part; that it is intended as an answer to some of the counts, but is in truth an answer to none; and that it is double and multifarious.

Digitized by Google

The declaration is against the defendants, as attorneys, for negligence in proceeding to collect money for the plaintiff, upon a claim placed in their hands for collection. The principal ground of complaint is, that the plaintiffs had omitted to sue one of the debtors, by reason of which the plaintiff lost his debt. In some of the counts the claim is styled a promissory note, and in others a writing obligatory. The plea to which the demurrer is filed styles it a writing obligatory. It states that they brought suit to the first term after they received the claim for collection, against one of the debtors, and recovered judgment; that he had a sufficiency of unincumbered property, bound by the judgment, to pay the debt, and that they would have obtained satisfaction of the judgment, but that the plaintiff, by his own act, surrendered up and vacated said judgment.

We cannot see any valid objection to this plea. What is said by this court in *Ellis* v. *Martin*, 2 S. & M. 192, is equally applicable to this plea. The defendants cannot be liable, if the plaintiff himself prevented the collection of the debt. It could not be material whether one or all of the debtors were sued, so the end were attained — the collection of the money. By his demurrer the plaintiff admits the truth of the plea, and thereby admits that he has no cause of action, if the plea be good in point of form. We cannot see any fatal defect in it, as it presents a fair issue upon a single point, which, if found in their favor, defeats the whole cause of action.

The judgment is therefore affirmed.

Digitized by Google

WILLIAM F. SMITH et al. *vs.* THE MISSISSIPPI AND ALABAMA RAILROAD COMPANY, use of James Bradley.

In an action of assumpsit by a bank upon a promissory note payable to itself, it is not competent for the court, at the instance of the defendant, to inquire into the organization of the bank, or as to fraud in the taking of its stock.

Where, in an action by a bank to recover the amount of a note payable to itself, the defendant proved that he had delivered to his counsel to use in evidence, the receipt of the bank for a certain amount of cotton, and that the receipt had been lost, and offered to prove the contents of the receipt: *Held*, that a sufficient foundation for the secondary evidence had been laid, and it should be admitted.

Where a party has executed his note, and afterward delivers cotton to the payee in part payment thereof, and takes the payee's receipt therefor; upon the loss of such receipt, the maker, when sued upon the note, may prove the delivery of the cotton in payment of his debt, by any other proof in his power, without producing or accounting for the receipt.

IN error from the Hinds circuit court; Hon. John H. Rollins, judge.

The Mississippi and Alabama Railroad Company, suing for the use of James Bradley, on the 23d of April, 1839, sued in assumpsit William F. Smith, Nathan Bryant and Hugh Campbell, on a note made by the defendants for $10,926 28, dated the 29th of March, 1838, and payable to the plaintiffs, ninety days after date, at their banking house in Brandon.

The defendants pleaded non assumpsit and payment with a notice of set-off of the value of 530 bales of cotton.

The case was submitted to a jury, who found for the plaintiffs the full amount of the note and interest.

From the bill of exceptions it appeared that on the trial, the defendants offered evidence with a view of showing that the transfer to the usee of the note sued on was fraudulent; which the court below rejected; they then offered the same evidence with a view of coupling it with other proof, to show that the whole course of the

Digitized by Google

bank had been fraudulent, and that it was so in its inception; the evidence was again rejected.

The defendants then offered to prove, that at the ostensible commencement of the bank, and before the origin of the note sued on, but thirty thousand dollars in specie of the one hundred thousand required by the charter, had been paid in, in specie, the residue being paid in fraudulent certificates of deposits in and the paper of other banks, and that soon after its organization the specie paid in was no longer on hand; this proof was also rejected.

The defendants then offered to prove that the note sued on was discounted by the plaintiffs in their own paper; that it was known, at the time of the discount, to them that but $30,000 in specie had been paid in, and that they had issued between seven and eight millions of notes, so that the notes issued by them were in point of fact worthless, which facts, known to the plaintiffs, were unknown to the defendants.

The defendants then having proved by J. J. Davenport, Esq. one of their counsel, that a certificate, purporting to be signed by William H. Shelton, which stated that Smith, one of the defendants, had a credit on the books of the bank for about six hundred bales of cotton, had been placed in his hands by Smith, to use as evidence of payment on the trial of the case, and had been in his possession since the commencement of the suit; that he had never seen Shelton write, but had seen his name to letters and bank notes, and from that believed the receipt was written and signed by Shelton, the president of the bank, and called for about six hundred bales of cotton. H. S. Foote, Esq., also of counsel for defendant, proved that he had seen the receipt in Davenport's hands, and recognized the writing of Shelton; Smith also made oath that he had placed the receipt in Davenport's hands. Davenport further proved that he had lost it, and after recent search had been unable to find it; whereupon the defendant asked that proof of the contents of the receipt might be made to the jury, but the court below refused to allow it, and exceptions were taken.

Other proof was offered to the jury of the reception of eighty

Digitized by Google

eight bales of cotton by the bank, which it is not deemed necessary further to notice, as the opinion of the court was irrespective of it.

The defendants moved for a new trial and filed in support of it an affidavit of Smith, one of the defendants, of the delivery of the cotton to the bank, with letters from the trustee of the bank, stating that it appeared by the books of the bank, that he had delivered 530 bales of cotton in 1837. Other statements and evidence were also offered on the hearing of the motion for a new trial, but are not noticed here. The court below refused to grant a new trial; a bill of exceptions, embodying all the evidence, was taken, and the defendants prosecute this writ of error.

Foote and *Hutchinson*, for plaintiffs in error.

1. Did the court below err in excluding the evidence offered to show that the transfer of the note in suit, from the nominal to the real plaintiff was fraudulent.

In support of the affirmative it is contended that the defendant, under the general issue might avail himself of any facts tending to prove that the plaintiff had not the cause of action alleged; and in a suit upon an indorsed promissory note, the question of *title* directly arises. Possession is *prima facie* evidence of title; 3 Kent Com. 789–80; but only *prima facie*. "Suspicion must be cast on the title of the holder, by showing that the instrument had got into circulation by force or fraud, before the *onus* is cast on the holder, of showing the consideration he gave for it." 3 Kent, 79.

In *King* v. *Milson*, 2 Camp. 5, Lord Ellenborough says: "There is a distinction between negotiable instruments and common chattels; with respect to the former, possession is *prima facie* evidence of property. I must presume that the defendant, when possessed of this note, was a *bona fide* holder for a valuable consideration. It lies upon you to impeach his title. You might have thrown so much suspicion upon his conduct in the transaction as to have rendered it necessary for him to prove

Digitized by Google

from whom he received the note, and what consideration he gave for it, but I think you have not done so."

In *Reynolds* v. *Cheule*, 2 Camp. 596, Lord Ellenborough said, "You must first cast some suspicion on his title by showing that the bill was obtained from the defendant, or some previous holder, by force or fraud." In *Rees* v. *The Marquis of Hertford*, 2 Camp. 574, the plaintiff, from circumstances developed at the trial, was forced to prove what consideration he gave for the bill sued on.

The usee, Bradley, must be treated as the holder; as the actual plaintiff. Act of 1822; How. & Hutch. 584, § 30; 1 Kent Com. 346; 2 Sumner, 251; 1 Kent, 323; 2 How. 642; *Anderson* v. *Patrick*, 7 How. 354.

Did the act of 1836, (H. & H. 595, § 29, 30, 31, 32,) rendering the contracts of partners joint and several, and providing that no written signature should be denied, or identity or description of persons suing, be required to be proved except such signature, identity or description be called in question by plea under oath, alter this rule of law? It does not in terms embrace the point here made, nor in spirit; as the question of title *in* the usee does not include or affect identity or description of the plaintiffs, nominal or real.

2. It was error to reject the proof offered to establish: 1. that the Mississippi and Alabama Railroad Company never had legal existence. 2. That if it had, it had not performed the acts necessary, by its charter, to be performed in order to be possessed of the power to make the contract sued on; so that the note was fraudulent and void. *Wolf* v. *Goddard*, 9 Watts, 554.

"There was a time in England," says the court, "when in matters of construction every intendment was made in favor of corporations; and the courts studied to extend, rather than restrain the meaning of terms granting corporate rights and privileges; and this upon the principle that their design is to provide some good that is useful to the public, and that through their instrumentality, the people regained from the crown some portion of those rights of which it had possessed itself. If the

Digitized by Google

franchise ceased it reverted to the crown, which was thus strengthened *against* the people. But this doctrine either never has, or never ought to have, prevailed here, at least since the 4th of July, 1776, because here the people are the legitimate source and depositary of power, and whatever is given to an association of individuals is so much abstracted from the rights of the citizens at large. And from the multiplication of corporations, the rule, of late years, has been changed in England, and is the same as that which exists in this country, viz.: that in the construction of grants of corporate rights a strict rule must prevail, and that all legitimate presumptions must operate in favor of the public rather than in favor of corporations."

In the case of the *Pennsylvania, Delaware, and Maryland Steam Navigation Company* v. *Dandridge*, Gill & Johns. Rep. 319, the court say, "In deciding whether a corporation can make a particular contract, we are to consider, in the first place, whether its charter, or some statute pending upon it, forbids or permits it to make such a contract; and if the charter and valid statutory law are silent on the subject, in the second place whether a power to make such a contract may not be implied on the part of a corporation, as directly or indirectly necessary to enable it to fulfil the purpose of its existence, or whether the contract is entirely foreign to that purpose."

See also *Kemper* v. *Turnpike Co.* 11 Ohio R. 393; 1 W. L. J. 228; *The Salem Mill-dam*, 9 Pick. 195; *Reed* v. *Benton and Manchester Railroad Co.* 4 How. 257; 1 Kent's Com. 464; 7 Wend. R. 558.

3. The secondary testimony offered in relation to Shelton's certificate, ought certainly to have been admitted. Its former existence was fully shown by evidence introduced. Its delivery by Smith to his attorney to be used as testimony was also attested, and that it had been lost or mislaid was shown, as well as searches in vain for it. Its character was also satisfactorily proved, inasmuch as the signature of William H. Shelton, the president of the bank, was fully established; and though it was not proved to have been signed by him in his official capacity, that presumption naturally arose in the absence of all evidence to the contrary.

Digitized by Google

Mr. Justice CLAYTON delivered the opinion of the court.

The questions as to the proper organization of the bank, and as to fraud in the taking of its stock, have already been determined by this court. They cannot be investigated in this mode of proceeding.

Of the other points raised in the argument, it will only be necessary to notice a single one.

The defendant proved by his counsel that he had delivered to them a receipt to be used as evidence in the suits, for some 600 bales of cotton, signed by Shelton, the president of the bank—proved the loss of the receipt—and then offered to prove its contents. The court refused to permit this to be done.

Not only was the party entitled to prove its contents, under the circumstances, but he was at liberty to prove the delivery of the cotton, in payment of his debt, by any other testimony in his power. The receipt was not the only proof which was admissible, and so clearly is this the law, that we are at a loss to perceive on what principle it was ruled differently by the court below.

For this error the judgment will be reversed, and a new trial granted.

Digitized by Google

FRANCES A. SELTZER, Administratrix of Henry Seltzer, deceased, *vs.* EZRA B. FULLER.

In an action against the indorser of a note, the notary's deposition was read by the plaintiff to prove the protest and notice; and the defendant read another deposition taken a year previous, of the same notary, about the same note, in which deposition he differed in his statements from those in the other, about the mode of giving notice; when the plaintiff proved, that when his first deposition was given, his notarial books were lost, and the notary testified from recollection; when the second was taken they were found, and the notary had refreshed his memory from them. The defendant, by way of rebutting this proof, then offered to prove the notary's general habit in keeping his notarial record, and that he was in the habit of leaving his memoranda of notices of protest in blank, to be filled up afterwards. The court below rejected the testimony thus offered in rebuttal; *held*, that it was admissible, and should have been received.

IN error from the Adams circuit court; Hon. C. C. Cage, judge.

Ezra B. Fuller sued Frances A. Seltzer, administratrix of Henry Seltzer, deceased, in *assumpsit* upon an indorsement by Henry Seltzer, in his life-time, of a note made by George W. Tyler, for $500, dated at Natchez, the 3d day of May, A. D. 1837, and payable six months after date, to James R. Kane, and by Kane indorsed to Francis Little, by Little to H. Gridley, by Gridley to said Henry Seltzer, who also indorsed it.

At the November term, A. D. 1843, of the Adams circuit court, judgment was obtained by the defendant, Fuller, against the plaintiff, Seltzer, for $595 44.

At the trial, the plaintiff below read to the jury as evidence, the deposition of James K. Cook, taken before J. A. Vanhoesen, J. P. on the 14th November, 1843, which states that the note sued on had been protested, and personal notice duly given of the protest to the said Henry Seltzer.

The defendant read to the jury as evidence, another deposi-

Digitized by Google

tion, which had been taken on the 23d day of November, 1842, before the same justice; and in which Cook stated that he knew nothing about protesting the note sued on; that he had no recollection thereof whatever.

John I. McMurran, Esq., on behalf of the plaintiff, proved that at the time the deposition first in date was taken, the notarial record, containing the protest of the note sued on, was lost or mislaid; this evidence was objected to by defendant's counsel, but the objection was overruled, and the evidence permitted to go to the jury. J. A. Vanhoesen, Esq. was then examined, who stated that at the time the deposition last in date was taken, the witness, Cook, had his notarial record before him; and that deposition accorded with the record.

The defendant then introduced Dr. A. P. Merrill, who stated that the handwriting with which the blanks were filled up in the said notarial record, which was partly printed and partly written, was that of S. Scott, a clerk in the Agricultural Bank, except the signature and the indorsement on the back, which was Cook's. The defendant, by her counsel, then propounded this question to this witness:

"Are you acquainted with the general habit of said Cook in keeping his notarial records? And was he not in the habit of leaving the memorandums of the notice of protest to be filled up afterwards?"

Which question was objected to by the plaintiff, and objection was sustained, and the answer excluded. Upon motion for a new trial by the defendants, being overruled, these facts were embraced in a bill of exceptions, and this writ of error taken.

The following causes of error were assigned:

1. The court below erred in permitting the evidence of John I. McMurran, Esq. with reference to the loss of the notarial record, to go to the jury.

2. Because the court erred in not permitting the witness, Dr. A. P. Merrill, to answer this interrogatory propounded to him: "Are you acquainted with the general habit of said Cook, in keeping his notarial records? And was he not in the habit of leaving the memorandums of the notice to be filled up afterwards?"

Digitized by Google

Thomas Reed, for plaintiff in error.

1. The evidence of McMurran should not have been admitted; it was but secondary evidence; the clerk of the probate court by law is the keeper of the records of the notary publics, and the clerk's deposition of the loss, if real, should have been taken. H. & H. 434, § 36; Green. Ev. (ed. 1844); tit. Best Ev. § 94; *Bullock* v. *Coon*, 9 Cow. 30; 1 Cow. & Hill's notes on Phil. Ev. 217.

2. The witness should have been permitted to respond to the question as to the habits of the notary. It was rebutting evidence; it was contended that Cook had refreshed his memory by the record; how could he refresh his memory by his record, if not made out at the time when the act was done? The fact sworn to was not written out at the time of its performance, and records can only be referred to, to refresh memories when that is done. 1 Cow. & Hill's Notes on Phil. Ev. 289; *Wood* v. *American Life Insurance Company*, 7 How. 609; 2 Cow. & Hill's Notes Phil. Ev. 728; Ibid. 509; Ibid. 766; 6 Serg. & Rawle, 324; 5 Watts R. 34; Green. on Ev. 539, § 461, 462; Ibid. 542, § 469; *Jones* v. *Foley*, 5 Mass. 101.

This testimony was admissible as impeaching Cook's deposition. 8 Wheat. R. 326; 19 Johns. R. 115, 122.

J. Hewett, for defendant in error.

It appears in the record, that the counsel for the defendant in the court below had notice of the taking the deposition, in relation to which they sought to attack the credibility of the witness. Then, in a cross-examination, was the time to ascertain, by searching interrogatories, any improprieties in his mode of keeping his record. To the testimony of Vanhoesen, proving how much better situated the witness was, at the time of taking his deposition in 1843, to state facts accurately, than when giving his testimony in 1842, there was and could be no objection. Surely then, it was not irrelevant to show, as we did by J. I. McMurran, that at the date of the first, the book containing the record was lost, but had been found before the taking of the second, and therefore witness was again called on.

Digitized by Google

As to the interrogatory propounded to Dr. Merrill, it is indefinite and vague to a degree, that even if otherwise proper, its answer could have settled nothing; and courts will set their faces against any attempt to make a general rule or custom, vaguely pursued and sought for by vague interrogatories, the ground on which either a contract shall be established, or the credibility of a witness assailed. 20 Johns. R. 175. So also in 2 S. & M. 135, the court evidently considered an inquiry into the custom of a notary in other cases than that at bar, as not relevant to the issue.

The testimony of Mr. McMurran was not introduced to prove the loss of a notarial record, in order to let in secondary evidence to sustain the issue joined, but merely to rebut an inference attempted to be raised unfavorable to the witness. Had the first been the object of his testimony, there would have been something perhaps in the objection.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of *assumpsit*, brought to charge the plaintiff in error, upon an indorsement made by her intestate. The evidence of demand and notice was contained in a deposition of the notary, in whose hands the note was placed. The defendant in the court below, then introduced another deposition of the same notary, given twelve months previous to the one read by the plaintiff, in which he gave a different and contradictory statement. The plaintiff below then proved that at the time the first deposition in the cause was taken, the notarial book of the witness was lost, and that he spoke from recollection alone; but when the last was taken the book had been found, and he had it before him to refresh his memory. Up to this point the evidence upon both sides seems to have been unobjectionable. To rebut the other testimony, the defendant then introduced a witness, and asked him the question, whether he was acquainted with the general habit of the notary in keeping his notarial record, and whether he was not in the habit of leaving his memorandums of the notice of protest in blank, to be filled up afterwards. Upon the plaintiff's objection, this testimony was excluded, and the case brought by bill of exceptions to this court.

Digitized by Google

We think this question falls within the rule laid down in the case of *Wood* v. *American Life Insurance and Trust Company*, 7 How. 609, in regard to the evidence of this same notary, and that the proof offered should have been received.

For the error in its exclusion, the judgment will be reversed, cause remanded and new trial awarded.

Mr. Justice THACHER, having been of counsel in the court below, gave no opinion.

Digitized by Google

Susan H. Calmes *vs.* John R. Ford.

Where an execution on a younger judgment was levied in December, 1840, on personal property which was advertised for sale on the 4th day of January, 1841, under that levy; and on the day of sale an execution on an older judgment was levied on the property under sale by virtue of the first levy; the judgment first levied, and under which the sale takes place, though junior in date, will be entitled to the proceeds of the sale; but the purchaser of the property will hold it subject to the lien of the older judgment.

In error from the Adams circuit court; Hon. C. C. Cage, judge.

Susan Calmes recovered a judgment against Horace Gridley in the circuit court for $738 90, on the 1st day of May, 1837. An execution issued on this judgment on the 19th day of December, 1840; and on that day was levied on a negro woman, and five casks of cheese, and three half-barrels of whisky, as the property of Gridley; which were advertised by the sheriff for sale on the 4th day of January, A. D. 1841. On that day, an execution at the suit of John R. Ford against Horace Gridley came to the hands of the same sheriff, on a judgment rendered on the 20th day of February, 1837; on this last judgment the sheriff made the following return: "Received this execution ¼ before 12 o'clock, Monday, A. M. January 4, 1841; levied this execution 4th January, 1841, on the following property of defendant H. Gridley, to wit: one negro slave named Leander, three half-casks whisky, and five casks cheese. S. B. Newman, sheriff." "Sold the above property this day, regularly advertised under an execution of Susan H. Calmes against H. Gridley, for the sum of $312 67. Natchez, January 4, 1841. S. B. Newman, sheriff."

At the ensuing term of the court, Ford moved to have the money thus made appropriated to his judgment; which was granted by the court; upon which Calmes excepted and prosecuted her writ of error.

Digitized by Google

Montgomery and *Boyd*, for plaintff in error.

From the facts above stated we conceive it is clear, that Mrs. Calmes was entitled to the money made under her execution, and the court erred in overruling the motion.

The facts briefly are, that Ford had the oldest judgment, and an execution thereon had been returned *nulla bona* at May term, 1840, after which no execution appears to have been made to cause satisfaction, but a large payment was voluntarily made. Mrs. Calmes, who held the younger judgment, by diligence and attention, discovered property of the defendant subject to execution, and had a levy made on the 19th of December, 1840. The sale came on the 4th January, 1841, and Ford, no doubt, having accidentally discovered that some money was likely to be made out of Gridley, conceiving it a fair opportunity to profit by the diligence and perseverance of others, caused his execution to issue and be handed to the sheriff after the hours of sale, and while the sale was progressing; and had a levy made on the same property. But the sheriff did not stop the sale, and take time to advertise the sale under Ford's execution. He proceeded to sell under Mrs. Calmes's execution, and noted his proceeding under both.

We will not contest that if both executions had been levied, and the sale made under both, the oldest judgment would be entitled to be first satisfied; but as there was no sale under the oldest judgment, its lien was not impaired, and, therefore, it was not entitled to be satisfied out of that fund. The decisions of this court on this subject are so full and direct to the point, that we do not conceive it necessary to do more than cite them. *Commercial Bank of Manchester* v. *Coroner of Yazoo County*, 6 How. R. 533. This case is precisely in point, unless a distinction can be shown between the liability of personal and real estate to the claims of judgment creditors. *Commercial and Railroad Bank* v. *Helderbran*, 6 How. 538; *Andrews* v. *Wilkes*, Ibid. 562; *Bibb, use of* v. *Jones*, 7 Ibid. 400.

W. G. Thompson, for defendant in error.

There could be no question, it is presumed, as to the correct-

Digitized by Google

ness of the judgment of the court below, if advertisement had been made for sale of the property under both executions. What is it that entitles a party to the proceeds of property levied upon by virtue of his execution? Is he entitled by virtue of advertisement made or by virtue of a levy and sale? Certainly by virtue of a levy and sale. Whatever irregularities and informalities there be in a sheriff's proceedings with an execution, provided there be an actual levy and sale under it, no one can object to the purchaser's title nor to the plaintiff's receiving the proceeds of the sale, unless it be the defendant in execution. The plaintiff in error cannot object to the money being appropriated to the execution of the defendant in error, on the ground that the property was not advertised to be sold under the execution of the latter. It is only the defendant in execution, if any one, who can object on that ground. The property having been, in point of fact, levied upon and sold under both executions, there remains, as between the parties to the record, the single question of priority of lien. *Minor* v. *The President and Selectmen of Natchez*, 4 S. & M. 602.

Mr. Justice THACHER delivered the opinion of the court.

This was a motion in the circuit court of Adams county to apply money to the satisfaction of an execution of the plaintiff in error. The plaintiff in error recovered a judgment against Gridley on the 1st day of May, 1837, and the defendant in error on the 20th day of February, 1837, against the same defendant. The execution of the plaintiff in error was issued on the 19th day of December, 1840, and was served on property the same day. On the 4th day of January, 1841, which was the day of sale under this execution, and at a quarter of an hour before twelve o'clock, A. M. of said day, the sheriff received an execution upon the judgment of the defendant in error which had been issued that day, and levied it upon the property then under sale. The court directed the appropriation of the money to the execution of the defendant in error.

In this case, the court below erred, as has been previously held by this court in the case of *The Commercial and Railroad*

Digitized by Google

Bank v. *Helderbran*, 6 How. 538. There was no sale of the property under the elder judgment and execution, and the sale under the junior judgment and execution does not divest the lien of the elder. The purchaser is supposed in law to take the property with its incumbrances, and there is no difference in this respect between real and personal property.

Judgment reversed, and the money directed to be appropriated to the execution of the plaintiff in error.

Digitized by Google

William H. Compton *vs.* Richard Compton et al. Administrator of Stephen Compton, deceased.

C. and H. filed a petition in the probate court, against W. C., alleging that W. C. and themselves were jointly administrators *ad colligendum*, on the estate of S. C., and that W. C. had in his possession property of the estate, which he claimed as his own, and refused to allow to be inventoried; and prayed that he might be required to inventory it; W. C. filed a plea to the jurisdiction of the probate court: *Held*, that the probate court should entertain jurisdiction of the petition; and W. C. might have an issue to the circuit court for the investigation of his claim to the property in his possession.

Aliter, if W. C. had been a stranger to the administration.

On appeal from the probate court of Jefferson county; Hon. Robert Duncan, judge.

At the February term, 1844, of the Jefferson probate court, Richard Compton and Smith Hubbard filed their petition, setting forth, that at the preceding December term of that court, letters of administration *ad colligendum* on the estate of Stephen Compton, had been granted jointly to them and William H. Compton; that appraisers had been appointed, and that petitioners had exhibited to the appraisers all the personal property of the deceased, which had come into their possession, and which was duly appraised, &c.; that their co-administrator *ad colligendum*, William H. Compton had in his possession a large amount of personal property belonging to the estate, which he refused to permit to be inventoried, or to allow petitioners to exercise any control over, jointly with himself; that this property (consisting of negroes, &c., which are described in the petition) was taken by the said William H. Compton from the said Stephen Compton, in his lifetime, as a loan returnable at the pleasure of the said Stephen, &c.

They then pray that the said William H. Compton may be required to answer, &c., and to produce and show said prop-

Digitized by Google

erty for the purpose of its being inventoried; and that he be required to join petitioners in the return of the inventory thereof, and to place said property jointly in the possession, and under the control of petitioners and himself.

In this petition, a plea to the jurisdiction of the court was filed, which plea was annulled, and the defendant ordered to answer.

From this decision he has prosecuted an appeal

Sanders and *Price*, for appellant.

We are not apprized of any law that confers such jurisdiction upon the probate court. It is manifest, from the showing of the appellees that the appellant claims the property as his own, and that he does not recognize or hold it is the property of the estate.

We know of no law authorizing two, or any portion of joint representatives to maintain an action against another portion thereof, for property not admitted to belong to the estate they represent.

Any decree that might be made by the probate court, in this controversy, would be no bar to the rights of the executors or legal representatives, heirs or creditors of the deceased, and as the law abhors multiplicity of action, it will not tolerate the exercise of doubtful power, by a court of inferior limited jurisdiction. Were the property admitted by the appellant to belong to the estate, the probate court might, *ex officio*, proceed against him, and compel him either to inventory it or remove him from office and appoint another to represent the estate, who could institute an action at law, before a court of competent jurisdiction, for the recovery of the same, or proceed upon his bond. It cannot be pretended that in such a resort, that the probate court would have jurisdiction of the matter; the jurisdiction of the probate court is in all matters testamentary and of administration in orphans' business, and the allotment of dower in cases of idiocy and lunacy, and of persons *non compos mentis*. Cons. art. iv. sec. 18. There is nothing in the grant that authorizes the jurisdiction contended for by the appellees in this case. The act of 1821, sec. 17, (H. & H. 472) authorizing the

Digitized by Google

said court to direct plenary proceedings, is supposed by us to have reference to certain civil jurisdiction formerly belonging to the county court, and subsequently conferred upon the probate court, and since taken away by statute, and can have no application to said court as organized under the new constitution, and subsequent legislation.

This question is a new one, upon which we believe there is no precedent or adjudication whereby to enable us to enlighten this court on the subject. From our view we contend that the order of the judge of the probate court, be reversed, with instructions to dismiss the petition of appellees, and that the appellant have his costs in both courts.

John B. Coleman, for appellees.

The plea to the jurisdiction of the court was properly overruled. The petitioners and the defendant were all officers of the court, and amenable to its jurisdiction. The facts set out in the petition (and which for all the purposes of the present proceedings stand admitted to the same extent as if the defendant had demurred) are, that the defendant, William H. Compton, who is a co-administrator with the petitioners, has in his possession, personal property of the estate, which he refuses to suffer to be inventoried; to compel him to do which, the interposition of the court is asked.

The constitution, art. 4 sec. 18, has given to the probate court jurisdiction in all matters testamentary and of administration, &c.

If this is not purely and exclusively a matter of administration, we are at a loss to conceive under what denomination it will fall.

"The jurisdiction of the probate court is exclusive over the matters confided to it by the constitution." "It is not a limited jurisdiction, but is general in all the matters mentioned. Whatever is a matter testamentary, or of administration, falls under the cognizance of the court of probates." *Blanton* v. *King*, 2 How. 856; *Charmichael* v. *Browder*, 3 How. 252; *Gildart's Heirs* v. *Starke*, 1 How. 450.

Digitized by Google

The very question, however, which is here presented, has been decided by this court in the case of *Killcrease et al* v. *Killcrease*, 7 How. 316. A petition was filed by legatees in the probate court, alleging that the executrix had failed to return an inventory of certain negroes of her estate, and praying that she might be compelled to do so. The petition was dismissed on motion of the probate court, and the case brought up by appeal. On the argument of the cause, it was contended by the counsel of the executrix that inasmuch as she claimed the property in controversy in her own right, a question of title was thereby raised, which the probate court had no jurisdiction to try. Upon this point, the court say: "No doubt an action might be sustained upon the bond, but we think the probate court likewise has jurisdiction in the matter, and power to compel a full inventory to be filed. If this is not the case, its jurisdiction in regard to the estates of decedents, which was intended by the constitution to be full and ample, and almost exclusive, will be far too confined to answer its ends and objects."

Considering this decision as covering the whole question, we deem it unnecessary to urge further argument, or cite additional authorities.

Mr. Justice THACHER delivered the opinion of the court.

Appeal from the probate court of Jefferson county.

The appellees filed a petition in the probate court setting out that they and the appellant were jointly administrators *ad colligendum* of the estate of Stephen Compton, deceased; that they had exhibited to appraisers, duly appointed, all the personal estate of their intestate, which had come into their possession; that their co-administrator *ad colligendum*, the appellant, had in his possession a large amount of personal property belonging to the estate of their intestate, which he refuses to permit to be placed upon the inventory of the estate, and which they allege was merely loaned to him during the lifetime of the intestate, but which he insists is his own property. To their petition the appellant filed a plea to the jurisdiction of the probate court, which

Digitized by Google

was overruled by the court, and the appellant decreed to answer the petition.

Under circumstances very similar to those of this case, this court has decided, that the probate court has jurisdiction of the matter, and power to compel a full inventory to be filed. *Killcrease* v. *Killcrease's Ex.*, 7 How. 316. If the property in question be a part of the assets of the intestate's estate, the probate court has full power to compel it to be added to the inventory, and, of course, can go into the inquiry to ascertain that fact. The appellant in his answer, may assert his claim of title, and enjoy the benefit of an issue to the circuit court, whereby the whole merits of his title can be made to receive full investigation. It is to be noticed, that this is a case of controversy between parties in the administration, and unlike the case of *Holleman* v. *Holleman*, decided at this term of this court, where one of the parties was a stranger to the administration.

Judgment affirmed.

Digitized by Google

SUTTON BYRD et al. *vs.* GEORGE HOLLOWAY.

An executor or administrator is not bound to pay the debts of his decedent, beyond the assets which he receives; nor will his written promise to do so, make him liable, unless founded on other sufficient consideration.

B. and J. B., being sued by H. upon their joint note, offered to prove that the note was given in satisfaction of a decree of the probate court against B., as administrator of P., who in his lifetime was administrator of N. P.; in favor of H., as administrator *de bonis non* of N. P.; which evidence the court refused to admit: *Held*, that the evidence was admissible; and that if the note were executed in settlement of that decree, B. and J. B. were not liable on it, unless B. had assets sufficient for its payment.

IN error, from the circuit court of Franklin county; Hon. V. T. Crawford, judge.

George Holloway sued Sutton Byrd and Ira E. Byrd, upon their joint note for one thousand two hundred and forty-three $\frac{44}{100}$ dollars, dated May 4, 1842, in favor of George Holloway. The defendants pleaded non assumpsit, and five special pleas; the first of which was in these words: "*dctio non*, because they say that said note was given in part satisfaction of a decree of the probate court of Franklin county, rendered at the February term thereof, A. D. 1842, in a certain matter of controversy in said court, depending wherein the said plaintiff, as administrator *de bonis non* of Nancy Porter, deceased, had obtained a citation against said defendant, Sutton Byrd, administrator of Abednego Porter, deceased, to show cause why he, the said Sutton Byrd, as administrator as aforesaid, should not pay over the amount due on a final settlement of the accounts of the said Abednego Porter, as administrator of Nancy Porter, deceased, to George Holloway, administrator *de bonis non* of said Nancy Porter, deceased, wherein, to wit: in said matter of controversy it was ordered, considered, and adjudged by the court, that the said Sutton Byrd, administrator as aforesaid, pay over to the

Digitized by Google

said George Holloway, administrator *de bonis non* as aforesaid, the amount due on final settlement of the accounts of said Abednego Porter, administrator of Nancy Porter, deceased, amounting to $8501 84, after deducting therefrom $6155,37½, already paid over, and this they are ready to verify; wherefore, &c."

The other four pleas were in substance the same, and consisted of the averment that the note was not given for a legal or valuable consideration.

To the special pleas the plaintiff demurred, and the court sustained the demurrer.

The issue taken on the general issue was submitted to a jury, who found for the plaintiff.

During the trial the defendant offered to read the copy of a decree of the probate court of Franklin county, in these words:

"*State of Mississippi, Franklin County Probate Court, February Term*, 1842.

George Holloway, administrator *de bonis non* of Nancy Porter, deceased, against Sutton Byrd, administrator of Abednego Porter, deceased. Upon citation to show cause why he shall not pay over the amount due on a final settlement of the accounts of the said Abednego Porter, as administrator of Nancy Porter, deceased, to George Holloway, as administrator *de bonis non* of said Nancy Porter, deceased; it is ordered, considered, and adjudged by the court that the said Sutton Byrd, administrator as aforesaid, pay over to the said George Holloway, administrator *de bonis non* as aforesaid, the amount due on final settlement of the accounts of said Abednego Porter, administrator of Nancy Porter, deceased, amounting to $8501 84, after deducting therefrom $6154 37½, already paid over."

This copy was certified under the official seal of the clerk of the probate court; the judge refused to permit it to be read to the jury, and the defendant excepted.

After verdict the defendant moved for a new trial, on the ground of the exclusion of this decree from the jury; and on

Digitized by Google

his motion being overruled, filed another bill of exceptions, spreading out the whole case; from which it appears that James M. Jones, on the part of the defendants, testified that the note sued on was written by him; that he assisted the plaintiff and Sutton Byrd in making a settlement; that the note was given in payment or satisfaction of the decree of the probate court of Franklin county, a copy of which he then held in his hand, being the same decree before recited in the record.

The defendants prosecute this writ of error.

Oscar J. E. Stewart, for plaintiffs in error.

1. The plaintiff below, being the administrator *de bonis non* of Nancy Porter, was not entitled to receive the sum due by Abednego Porter, the former administrator of that estate. The heirs and distributees of Nancy Porter were entitled to it, not the administrator *de bonis non*, who had given no bond for its distribution, or administration.

2. The note sued on was unsupported by any good or valuable consideration; it imported no legal obligation therefor against the makers. Had the decree been permitted to go to the jury, in evidence, the chain of testimony would have been complete, that the note was a *nudum pactum;* and the defendants would have been entitled to a verdict.

3. The pleadings, though informal perhaps, clearly set out the defence; the first special plea states that the note sued on was executed for no other consideration, than the one of the decree against Byrd, as administrator of Porter; a sum for which, personally, he was not at all responsible, and which, by his mere promise, he could not be forced to pay. This is pleaded, and is a bar to the action.

Montgomery and *Boyd*, on the same side:

Without noticing further the points already commented on, it is evident the court erred in not admitting, under the general issue, the paper referred to by Jones, the witness, even if it be true that this copy from the minutes was not evidence under the special pleas, or was not a record, but only an extract from

Digitized by Google

the minutes. The witness swore that the note sued on was given in consideration of the demands contained in the paper, or copy referred to; it became, therefore, wholly immaterial whether the copy was a record or a mere private memorandum. It constituted the consideration of the note; and not amounting in law to a good or valuable consideration, the note was void, a mere *nude pact*. This was clearly proper proof under the general issue; it made, even a stronger case for the defendant, than if it had been a perfect record; because it did not constitute a *prima facie* demand or liability.

Cassidy, for defendant in error.

1. The pleas were defective; the one which sets up that the note was given in satisfaction of the decree of the probate court referred to, is bad, both in substance and form; in substance, for the decree is valid and binding until reversed, and cannot, for any defects, be collaterally attacked, the subject-matter being wholly within the jurisdiction of the probate court; the plea does not aver that the decree was illegal or erroneous, but argumentatively leaves it for inference. If issue had been taken on the fact alleged that the decree was the consideration of the note, it would have been an immaterial issue, and no judgment could have been rendered on it; a repleader must have been awarded. The other pleas, setting up that the note sued on was without consideration, are mere conclusions of law, not issues of fact, and as such, bad. 1 Chit. Pl. 573; 19 Johns. R. 371.

2. Did the decree of the probate court tend to prove the issue? If not, it was rightly rejected. 5 How. R. 499. The decree was in the course of administration, in favor of an administrator *de bonis non* — against an administrator, the probate court had jurisdiction, therefore, and the decree, however erroneous, not void; and the decree, so far as the circuit court was concerned, being obligatory upon Byrd, his note, executed in satisfaction of it, would also be obligatory. The decree was then a good consideration for the note, and being so, was properly excluded, as not tending to prove the issue, to wit: the absence of consideration.

Digitized by Google

3. The whole record, and not the mere decree, should have been produced; part alone was inadmissible. 5 How. R. 58.

Mr. Justice CLAYTON delivered the opinion of the court.

The defendant in error brought suit in the circuit court of Franklin county, against Sutton Byrd and Ira E. Byrd, upon their joint promissory note. Several special pleas were filed by the defendants, stating that the note was given in satisfaction of a decree of the probate court against Sutton Byrd, as administrator of Abednego Porter, deceased, who was administrator of Nancy Porter, deceased, in favor of the plaintiff as administrator *de bonis non* of said Nancy Porter. To these pleas a demurrer was filed, which was sustained. The general issue was also pleaded, and as the whole proposed defence was admissible under that plea, the decision upon the demurrer need not be revised. Upon the trial, the defendant offered to introduce the decree as evidence, and to prove that the note was given in satisfaction of said decree, but the court ruled it out.

An executor or administrator is not bound to pay the debts of his decedent, beyond the assets which he receives. His promise will not make him liable, unless founded on a sufficient consideration. After promise, he still remains chargeable as before, only to the extent of assets in his hands, in the same manner as if no such promise had been made. By the common law, a good consideration is requisite to make such promise bind personally; and the statute of frauds superadds the requisition that it shall be in writing. 2 Lom. Ex. 274.

The point must be open to inquiry, whether the note upon which this suit was brought, was founded upon the decree of the probate court, and whether it is payable to the plaintiff in his own right, or as administrator *de bonis non* of Nancy Porter, deceased; whether it was for a debt which it pertained to him, as such administrator, to collect, or for one with which he had no concern. The nature of the consideration for the note, and the fact of assets to pay it, must also be considered, before a verdict can properly be rendered against the defendants.

There was error in the opinion of the circuit court, excluding

Digitized by Google

the decree of the probate court from the jury, and for this error the decree must be reversed.

Several other difficulties will probably be found to arise in the way of the plaintiff, in the farther prosecution of this suit; but as they are not now presented, we allude to them merely to show that these points are still open.

Judgment reversed, and new trial awarded.

Digitized by Google

CHARLES J. HUMPHREYS and HOWES H. COLEMAN, Administrators of Perry W. Humphreys *vs.* DAVID IRVINE, use of John R. Fentress.

Our statute directs that the death of the nominal plaintiff, during the pendency of a suit, shall not cause its abatement; but it does not authorize the commencement of a suit in the name of a person no longer in existence.

It is erroneous to exclude evidence that the nominal plaintiff died before the suit was instituted; for if it be shown to the satisfaction of the court that the nominal plaintiff was dead at the time the suit was commenced, the effect must be an abatement of the suit.

ERROR from the circuit court of De Soto county; Hon. James M. Howrey, judge.

This was an action of debt, on a writing obligatory, brought by David Irvine, for the use of John R. Fentress, against Charles J. Humphreys and Howes H. Coleman, administrators of Perry W. Humphreys. The defendants filed a plea of payment, upon which issue was taken. On the trial the defendants offered to prove that David Irvine was dead at the time of the commencement of the suit; the plaintiff's counsel objected to the evidence, and the court sustained the objection, and excluded it from the jury, on the ground that the character of the parties suing could not be denied, except by plea under oath. To which opinion of the court the defendants excepted. The defendants, after a verdict and judgment in favor of the plaintiff, entered a motion for a new trial, which was overruled by the court, and they again excepted, and have now brought the case to this court, by writ of error.

D. C. Glenn, for appellant.

The rule of law, as stated, that no evidence going to dispute the character or identity of the party suing, except by way of

Digitized by Google

plea in abatement, verified under oath, can be used, is admitted. In this case we do not seek to do so. We asked to be permitted, under the general issue, to show that the party whose name is used by the usee in this action, has no interest therein. Our proof implies the truth of the character and identity of the party, and upon the truth of that very fact we have our right to make this proof as to his interest, and to let it go to the jury. See 4 T. R. 361; 1 Salk. 114; 1 H. Bl. 108; 3 Black. R. 1236. If the suit had been in the name of Irvine alone, we could not have done so. But suppose we had filed an affidavit denying the interest of the usee and his title to use Irvine's name, because he was dead, stating the facts, and calling for his authority so to do. Could we not have done it, and would we not thus have reached his interest without a plea in abatement. Surely so. 7 How. 355. We offered to show that Irvine died before the institution of the suit. Such being the case, the right of action in the note went to his administrators or executors, and their names alone could be used in enforcing payment. The interest of Irvine, sought to be used, had, *eo nomine*, passed to others, and his name could not be used. Upon this record David Irvine is the active party suing. Such a one cannot recover unless he has an interest, and of this interest the jury must be satisfied. 7 How. 355. In this case the court refused a motion to dismiss a cause, for want of proper showing of interest, saying, such an inquiry was proper only for a jury. Ibid. 355. This was all we sought to do. John R. Fentress is the real party interested in this action; he derives his interest from Irvine. We sought to show that Irvine had no interest, at the commencement of the suit; that he was dead, and his interest as David Irvine extinct, and incapable of being used as simply such, and to leave the matter to the jury alone as proper for such an inquiry. This the court refused, which we assign as error, and pray a reversal.

Van Winkle and *Potter*, for defendant in error.

Proof of the death of the nominal plaintiff could not be offered under the plea of payment. By that plea the defend-

Digitized by Google

ants admitted the existence and title of Irvine. H. & H. 595, sec. 32. The plea of payment was no general issue; the defendants were not privileged, under the statute, to offer such proof under this plea. In a case like this, the administrators were as much bound to plead the matter, as would be any other defendant. *Ellis's Administrators* v. *Planters Bank*, 7 How. 240.

If defendants could prove such a matter after a plea of payment, it is clear that the proper course was not to show the fact by proof to the jury under such an issue.

Fentress was the real plaintiff in the suit, the responsible party, liable for costs, &c. It seems frivolous to complain that the defendants were not permitted to prove the death of a party who had no interest in the subject-matter, nor in the event of the suit. Why then, should this judgment be reversed?

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of debt upon a writing obligatory. There are various alleged errors in the proceedings, but it will be sufficient to, notice a single one. During the trial the defendants offered to prove that David Irvine was dead at the time the suit was brought. This evidence was objected to, and rejected by the court, to which a bill of exceptions was filed.

This was erroneous. A judgment for or against a dead man is usually a nullity. Our statute directs that the death of the nominal plaintiff during the pendency of the suit, shall not cause its abatement. H. & H. 584. This constitutes perhaps the only exception. But this cannot be construed to authorize the commencement of a suit, in the name of a person no longer in existence. It matters not at what time the fact of the death of a party is made known to the court; nor in what form. The objection rises above the mere technical rules of pleading, and goes to the right of the court to proceed. It stops the cause at whatever stage it may be, whenever made known to the court.

Digitized by Google

The exclusion of the testimony was therefore erroneous. If the fact is made out to the satisfaction of the court, the effect must be an abatement of the suit, as it will show it was wrongly brought at its inception.

Judgment reversed, and cause remanded.

Digitized by Google

ALEXANDER C. HENDERSON, Administrator of Joseph Leroux, deceased, *vs.* BAZILLE GUYOT.

Wade v. *Grimes*, 7 How. 425, cited and confirmed.

If the right of a married woman to the distributive portion of a deceased person's estate accrue after marriage, the husband may sue for it alone.

If the husband sue alone for his wife's distributive portion in an estate, and it do not appear by proof that the right of the wife accrued before coverture, and the probate court decree in favor of the husband, the presumption will be in favor of the correctness of the decision of that court.

If the probate court, during the life-time of a wife who is a distributee of an estate, decree the wife's distributive portion to be paid to the husband on his sole petition, and the wife die before the money is paid to the husband, the death of the wife will not affect the right of the husband to such distributive portion.

APPEAL from the probate court of Adams county; Hon. Thomas Fletcher, judge.

At the May term, 1840, of the probate court of Adams county, Bazille Guyot filed his petition, representing that his wife, Francoise Leroux, was the sister and sole heir of Joseph Leroux, deceased, and prayed that Alexander C. Henderson, administrator of Leroux, be ordered to pay over to him, as heir in right of his wife, of said Leroux, all the estate (which was in money) of said deceased, and which was at the time of filing said petition, or would be thereafter in his hands as administrator. After due publication having been made, citing all persons interested in the distribution of said estate, to be and appear on a day therein named, to answer said petition, the judgment *pro confesso* was entered in the case at the December term of said court, 1842, and upon due proofs having been made to the court substantiating the right of said Guyot's wife to a distribution of said estate, it was at the January term, 1843, of said court, ordered that Henderson pay over to Guyot, or his lawful attor-

Digitized by Google

ney, all the estate of said Joseph Leroux, deceased, upon his giving a refunding bond.

It did not appear, however, in proof, *when* the right of Mrs. Guyot accrued to her distributive portion of her brother's estate; whether before or after her intermarriage with Guyot.

At the October term, 1843, of the court, the estate not having been paid over to Guyot, in consequence of his failing to give a refunding bond, the administrator, Henderson, represented to the court, that since the decree he had received information of the death of Francoise Leroux, the wife of Guyot, leaving children of her and the said Guyot; that he had presented his final account, and was then ready to pay over the estate of Leroux without a refunding bond, and asked of the court whether Guyot was entitled to receive the estate under the decree previously made, or whether his children, begotten of said Francoise Leroux, would not be entitled to the same as her heirs. The court decreed that the estate should be distributed according to the decree made at the January term, 1843, and ordered Henderson to pay over the estate to Bazille Guyot, as heir in right of his wife, of said Joseph Leroux, deceased, without a refunding bond. Whereupon, Henderson prayed and prosecuted this appeal.

Carson, for appellant.

According to the statute of this state respecting descents, (H. & H. 393, 394,) we think that the children of Bazille Guyot, by his wife Francoise Leroux, are clearly entitled to the estate of Joseph Leroux, deceased.

McDannold and *Matthewson*, for appellee.

We think, from a reading of the record in this case, it will appear that Bazille Guyot is the only person entitled to the property of Joseph Leroux, deceased. The decree ordering a distribution, and the property to be delivered to B. Guyot, as heir of Leroux, in right of his wife, was made during the lifetime of the wife, and he was only prevented from getting possession from his inability to give a refunding bond. In 6 Johns.

Digitized by Google

110, it was held that a husband who survives his wife, is entitled to her choses in action, whether reduced into his possession in her lifetime or not. The estate in this case consisting altogether of money, we think, upon the principle decided in the above case, that Bazille Guyot is entitled to the estate. See case of *Elliot* v. *Collins*, 3 Atk. 527; *Cast* v. *Russ*, 1 P. Wms. 381.

Mr. Justice CLAYTON delivered the opinion of the court.

This is an appeal from the probate court of Adams county.

Guyot filed his petition for a distributive share of the estate of Joseph Leroux, deceased, in right of his wife, which was decreed to him at the January term, 1843, of said court. At the following December term, the administrator filed a petition, stating the death of Mrs. Guyot, and asking in effect the decree to be set aside on that ground. This was refused, and an appeal taken to this court.

Almost every point in this cause was discussed and decided in the case of *Wade* v. *Grimes*, 7 How. 425. It does not appear, in this case, whether the right of the wife to the distributive share accrued before or after her coverture. If it accrued afterwards, then the petition was properly filed by the husband alone. In the absence of proof that the right accrued before marriage, we are bound to presume in favor of the correctness of the decision in the court below. The right was therefore in the petitioner, and upon the death of his wife, there was no change of that right.

The order of the court below will be affirmed.

Digitized by Google

Edward Bonnaffe et al. *vs.* Erasmus D. Fenner et al.

Although, as a general rule, one partner cannot sue his copartners at law for a sum of money due on account of the partnership, unless it be the balance of a separate account, or a general balance of accounts; yet where several partners execute a note payable to one partner, even though on account of matters connected with the partnership, it is an acknowledgment of a separation of the sum from the partnership account, and the payee may maintain an action at law on the note.

In an action of assumpsit, brought by B., as the bearer of a note made payable to M., or bearer, for the use of the Real Estate Banking Company of Hinds County, by F. and others; on proof that the makers of the note and the payee were all members of the company for whose use the note was made: *Held*, that B. might, notwithstanding, maintain his action on the note.

In an action of assumpsit, by the bearer of a note made payable to M. or bearer, for the use of the Real Estate Banking Company, it will not be necessary to set out the words stating for whose use the note was made, as they constitute no part of the legal contract.

Where partners, when sued, seek to establish the existence of the partnership, they must produce the letters of partnership, or give a legal excuse for their non-production, before the partnership can be proved by other evidence.

In error, from the circuit court of Hinds county; Hon. George Coalter, judge.

Augustus and Edward Bonnaffe, partners, under the firm of Bonnaffe & Co. brought an action of assumpsit in the court below, upon this note:

"$3375. *Clinton, Mis. December* 13, 1838.

Twelve months after the 13th day of December, 1838, we, or either of us, promise to pay Cowles Mead, or bearer, for the use of the Real Estate Banking Company of Hinds County, at their banking house, in Clinton, three thousand three hundred

Digitized by Google

and seventy-five dollars, without defalcation, for value received.

E. D. FENNER,
JAS. M. WALL,
J. A. McRAVEN."

In the declaration the plaintiffs averred themselves to be the lawful bearers of the note.

The defendants plead the general issue.

On the trial the plaintiffs rested their case with the reading of the note; when the defendants proved, by J. F. Foute, Esq., that the defendants, at the time of the execution of the note, were partners with the said Cowles Mead, (the payee of the note,) and others, in the said Real Estate Banking Company, for whose use the note was made; the witness testified further, that the association existed under written articles of partnership, signed by the copartners, upon which the plaintiffs objected to the parol proof of the partnership, without the production of the original articles; but the objection was overruled. This was all the testimony in the case.

Upon which the defendants asked the court to instruct the jury as in case of a nonsuit; whereupon the court instructed the jury that the plaintiffs were not entitled to recover from the defendants in that action. The jury found for the defendants; and the plaintiffs prosecute this writ of error.

Van Winkle and *Potter*, for plaintiffs in error, contended:

1. That the plaintiffs could recover on the note, although Mead, as a partner in the company, had no legal cause of action on the note, against the defendants. On this point they cited *Smith* v. *Lusher*, 5 Cow. 685; *Nevins* v. *Townsend*, 6 Conn. R. 5; *Blake* v. *Wheadom*, 2 Hayw. N. C. Rep. 109; Bailey on Bills, 116; *Morris et al.* v. *Hillary et al.* 7 How. 61; Chitty on Bills; 266; Bailey on Bills, 115; 3 Kent Comm. 89; Coll. on Part. 217 and n.; *Guernsey* v. *Burns*, 25 Wend. 412; *Gage* v. *Kendall*, 15 Ibid. 641; *Mandeville* v. *Welch*, 5 Wheat. 277; Chitty on Bills, 79; Bailey on Bills, 492; 1 Selwyn's Nisi Prius, 292; *Thomas* v. *Bishop*, 2 Stra. 955.

Digitized by Google

2. That the note was a legal cause of action, in favor of Mead, the trustee; he might have recovered against the defendants, in an action at law on the case. *Van Ness* v. *Forrest*, 8 Cranch R. 31; *Smith* v. *Burton*, 3 Vermont R. 235; *Stone* v. *Brooks*, 6 How. 373; Chitty on Bills, 180, 226, 428, 566; Bailey on Bills, 76, 115; 1 Selwyn's Nisi Prius, 292; 3 Kent's Comm. 89; *Commissioners of Sinking Fund* v. *Walker*, 6 How. 187, 188; *Chaplin* v. *Canada*, 8 Conn. R. 286; *Binney* v. *Plumpley*, 5 Vermont R. 500; *Bank of the United States* v. *Devaux*, 5 Cranch, 91; *Irvine* v. *Lowry*, 14 Peters, 300; *Banerman* v. *Radenius*, 7 T. R. 663; *Wade* v. *Tinkler*, 16 East, 36; *Tucker* v. *Tucker*, 4 B. & Ald. 748; Willis on Trustees, 16, 72, and n. *e*, 73, 83, 86, 87, 100, 127, 182, 201, 495; Lewin on Trustees, 247, 267; *Bonnaffe & Co.* v. *Williams*, 3 How. S. C. Rep.; *Newman* v. *Montgomery*, 5 How. 742; *Rae* v. *Read*, 8 Term R. 148: 1 Scho. & Lef. 67, n. *c*; *Irvine* v. *Lowry*, 14 Peters, 300; Chit. Pl. 190; Coll. on Part. 165.

3. The cases in which it has been held that one partner cannot sue his copartner at law, were in actions on particular demands, founded on partnership transactions, and not separated by the acts of the parties from the partnership account: or where the partner sought to recover such unascertained balance as might be found in his favor, on a final adjustment of the general account. *Neale* v. *Turton*, 4 Bing. 149; *Jackson* v. *Stopherd*, 3 Cromp. & Mees. 361; *Coffee* v. *Brian*, 3 Bing. 54; *Gibson* v. *Moore*, 6 N. Hamp. R. 527; Story on Part. 527, n. 1; Coll. on Part. 392; Story on Part. 241; Coll. 91, 504; Story on Part. 240, 366, 367; *Wright* v. *Hunter*, 1 East, 30; *Neale* v. *Turton*, 4 Bing. 150; *Brierly* v. *Cripps*, 7 Carr. & Payne, 709, and n.; Story on Part. 320, n. 1; Coll. on Part. 148, 152; *Smith* v. *Barron*, 2 Term R. 476; *Simpson* v. *Rockham*, 7 Bing. 617; *Mainwaring* v. *Newman*, 2 Bos. & Pull. 120; *Moffat* v. *Van Millenger*, Ibid. 124, n. c; *Venning* v. *Lechie*, 13 East, 7; *Gale* v. *Leckie*, 2 Stark. 96; Story on Part. 320, n. 1; Coll. on Part. 148; *Davis* v. *Tiernan*, 2 How. 804; *Jameson* v. *Franklin*, 381.

Digitized by Google

4. The circuit court also erred in admitting secondary evidence to prove the existence of the partnership, when it was shown that higher evidence existed.

J. F. Foute, for defendants in error, insisted,

1. That parol evidence could be offered to prove a partnership, without the production of, or accounting for, the original articles; and that a contrary doctrine would work great hardship. Coll. on Part. 449, 450, § 8; Ibid, 451, *et seq.*; Gow on Part. 153, 154, 155, 207, 208, *et seq.*

2. That the instruction of the court that the plaintiffs could not maintain their action, was correct. *Nevan* v. *Spickerman*, 12 Johns. R.; *Canston* v. *Burke*, 2 Har. & Gill, 295; Coll. on Part. 143, 144, § 2, *et seq.*; Ibid. 158, § 5.

3. That the note, payable on its face, for the use of the Real Estate Banking Company, was for their use, into whosoever hands it might come, and established a trust in the hands of the assignee, or transferee, in favor of the company.

4 In reply, he contended that if Mead, the payee, had no cause of action, his transferee could have none. *Morris* v. *Hillery*, 7 How. 61. That Chitty, 226; Bailey, 118; 3 Kent's Comm. 89, applied to trustees who held the mere naked legal title, without beneficial use; that the note sued on was not assignable by delivery, but was a mere voucher, to be used in settlement between the parties, as evidence of indebtedness; that the contract was expressly worded so as to exclude the possibility of Mead so assigning the note as to deprive the company of the use and benefit of it; and that when the proceeds of the note were collected, the defendants themselves, as partners, would be entitled to participate in the division of them; that the authorities cited by the plaintiffs applied exclusively to commercial paper under the commercial law, and to implied trusts, unknown to the *bona fide* holder; but not to a case where the trust is explicitly declared on the face of the paper.

Mr. Justice Thacher delivered the opinion of the court.

Plaintiffs instituted their action of assumpsit, in the Hinds

Digitized by Google

county circuit court, as the bearers of a promissory note made by the defendants, payable to Cowles Mead, or bearer, for the use of the Real Estate Banking Company of Hinds county. The defendants plead the general issue, and a verdict was rendered for the defendants. Upon the trial, the defendants offered to prove that the makers of the note, and Mead, the payee, were members and partners in the said Real Estate Banking Company of Hinds county, and, while it was in proof that said company had been constituted a copartnership, by written articles, the court below allowed oral evidence that the individuals aforesaid were partners in said company, at the time the note in suit was made. That court, also, at the request of the defendants charged the jury that, under the circumstances of the case, the plaintiffs could not, in law, recover in the action. Upon these two points, the case is brought into this court.

It is laid down as a general rule, that where one partner has a claim upon his copartner, for a sum of money due on account of the partnership, but not constituting the balance of a separate account, or a general balance of all accounts, he cannot recover by action at law. Collyer on Part. 158. This rule arises from the fact that, at law, no account can be taken between two partners. But this rule has exceptions, and the circumstances may be such that one partner may recover at law from his copartner, although the matter creating the indebtedness may be connected with the partnership. A prominent exception takes the place of the rule when the sum sought to be recovered is separated from the partnership account. Ibid. 148. The making of a promissory note by several partners, in favor of another, is an acknowledgment of a separation of the sum from the partnership account. Ibid. 148. *Smith* v. *Lusher*, 5 Cowen, 688. The insertion in the note, in this instance, of the words "for the use of the Real Estate Banking Company," constitutes no part of the legal contract, and need not necessarily have been set out in the action. The legal title to the note was originally in Mead, and the note being assignable by delivery, the bearer could institute an action in his own name. Chitty on Bills, 226.

Digitized by Google

The existence of a copartnership is undoubtedly best established by a production of the letters constituting it, when such exist. It may, however, be otherwise proved. Yet when parties, who are themselves partners, seek to establish the existence of the copartnership, they should be required to bring forward the letters, and not allowed to prove it *aliunde*, without first showing a legal excuse for the non-production of the letters.

Judgment reversed, and new trial awarded.

Digitized by Google

The State of Mississippi *vs.* The Commercial Bank of Manchester.

A judgment *non obstante veredicto*, cannot be rendered after a judgment upon the verdict has been entered; the rule on that subject is, that the motion for such judgment (*non obstante veredicto*) must be made immediately after the verdict, and before a judgment is rendered on it.

Where in a proceeding by information in the nature of a *quo warranto* against a bank, the court was asked to charge the jury, that if they believed from the evidence that the cashier, or teller, or clerks of the bank, as officers and agents of the bank, received either directly or indirectly from any one the notes of non specie-paying banks, in payment for any part of the capital stock of the bank, they must find for the plaintiff; it was *held*, that the charge was too broad; that to make a payment binding on the corporation, it should be made to some agent authorized to receive it; and that the charge as asked was properly rejected.

The acts of a cashier of a bank are only binding upon the bank when he acts within the sphere of the agency prescribed to him; if there be no express regulation or restriction, all acts which appertain to his office will affect the bank; if he be restricted or limited in the scope of his agency by the bank, the act of the cashier in violation of the restriction, or beyond the limit, will not be the act of the bank.

In a proceeding against a bank by information in the nature of a *quo warranto*, the acts of the cashier, when proved, will be *prima facie* binding on the bank when performed in the discharge of the ordinary duties which belong to that officer; and in order to avoid such acts of the cashier, it devolves upon the corporation to show a special restriction, imposed upon the cashier by the directors.

A directory of a bank may, through its cashier, violate the charter of the bank; if, however, they can show that in the particular act of the cashier, alleged to be a violation of the charter, he departed from his duties as prescribed by them, such act will not cause a forfeiture of the charter.

Where in an information in the nature of a *quo warranto* against a bank, the court was asked to charge the jury, that "if they believed from the evidence, that it was agreed between the cashier of the bank and M., a holder of part of the capital stock of the bank, that M. should, to make payment of his stock, and evade the charter of the bank, procure the notes of the bank which was then a non specie-paying bank; that the cashier should receive

Digitized by Google

the notes, count out their amount in specie, and immediately take or receive back said specie, without M. being at liberty to take the same from the bank, and that he should thereupon receive a certificate of stock; and that said M. did so pay an instalment on his stock, and receive a certificate, they must find for the plaintiff;" there being proof that the board of directors had given positive directions that nothing but gold or silver, or the notes of specie-paying banks should be received in payment of stock; it was *held* that the charge as asked was properly refused, not having reference to the testimony before the jury.

In error from the circuit court of Yazoo county; Hon. Robert C. Perry, judge.

At the May term, 1844, of the circuit court, Robert C. Perry, Esq. then district attorney in and for the tenth judicial district of the state, filed an information in the nature of a *quo warranto*, under the law passed and approved July 26, 1843, against the Commercial Bank of Manchester, charging the bank with the exercise of franchises to which it was not entitled, to wit: that of being a body politic and corporate in law, fact and name, by the name of the Commercial Bank of Manchester, and by the same name to plead and be impleaded, answer and be answered unto; and also the following liberties, privileges, and franchises, to wit, that of being or becoming the proprietors of a bank or fund for the purpose of issuing notes, receiving deposites, making discounts, and transacting other business which incorporated banks may lawfully transact by virtue of their respective acts of incorporation; and also that of actually issuing notes, receiving deposites, making discounts, and carrying on banking operations and other moneyed transactions, which are usually performed by incorporated banks, and which they alone have a right to do; all of which liberties, privileges and franchises the bank, for the six months previous to the filing of the information, it was alleged had usurped, and still did usurp upon the state, to its great damage and prejudice.

Upon the filing of the information, process and a writ of injunction, as provided by the sixth section of the act issued, and were served.

The bank appeared at the return term of the writ, and plead

Digitized by Google

that by an act of the legislature of the state, passed on the 26th of February, 1836, the bank was incorporated; and set out the act of incorporation in her plea.

To this plea the state filed fourteen replications; the second and fourteenth of which being the only ones relied on, the others are not farther noticed, except to state that the defendants filed a general demurrer to all of the replications of the state; which was overruled as to all but two, and sustained as to them. The defendant then moved the court to compel the plaintiff to elect which replication he would proceed under; which was refused by the court, and the case proceeded on the second and fourteenth replication.

The second replication averred *precludi non*, because the subscribers for stock to the bank wholly failed to pay the first, second, third and fourth instalments due upon the stock, after the first regular meeting of the board of directors, as required by the charter, and instead thereof and in violation of the charter, made their several promissory notes for the sums due from each on the instalments, which the bank fraudulently with intent to violate the charter, discounted and placed the proceeds to the credit of the subscriber, who then paid neither gold nor silver, nor the notes of specie-paying banks for his stock.

The fourteenth replication was *precludi non*, because the subscribers and owners of the capital stock had wholly failed by contract with and consent of the bank, to pay the bank for their stock as required by the act of incorporation.

The rejoinder to these replications was, that on the 15th of February, 1838, the legislature of the state had passed an act, which is set out in full in the rejoinder; the title of which was, "An act to reduce the capital stock of the Commercial Bank of Manchester, and for other purposes;" and which in substance provided for the reduction of the capital stock to a sum not exceeding a million of dollars; and to enable the accomplishment of that end, releasing the bank from the establishment of a branch, as provided by the charter; the act was to take effect and be in force from and after its approval by the board of directors of the bank. The rejoinder averred further, that on the

Digitized by Google

22d of March, 1838, this act was approved, accepted and adopted as a part of the charter by the directory, three-fourths concurring therein; that the legislature, at the time of the passage of this act, knew of the alleged ground of forfeiture by the discount of notes in payment of stock, and by the passage of this act they had waived all such ground of forfeiture; and that since the passage of the act, the bank had not received in payment of stock any of its own notes, or anything but gold and silver and the notes of other specie-paying banks.

For surrejoinder to the rejoinder to the second replication, the state averred, that since the passage and approval of the above act of the legislature, the subscribers and owners of the capital stock of the bank had fraudulently paid, and the bank fraudulently accepted in violation of the charter, notes of the several banks of this state, which were not at that time specie-paying banks, and which did not and would not, at that time pay specie.

To the rejoinder to the fourteenth replication, the state averred, that since the passage of the act referred to, the owners and subscribers for the capital stock of the bank had wholly failed to pay the amounts unpaid on their stock at the time the said act was passed by the legislature, in the manner required by the act of incorporation, and instead thereof they had paid their stock to the bank, and the bank had accepted from them payment therefor in the notes of the Agricultural Bank of the State of Mississippi, the Planters Bank of the State of Mississippi, the Commercial Bank of Natchez, the Commercial and Railroad Bank of Vicksburg, the Mississippi and Alabama Railroad and Banking Company, which banks were not, when the payments were made, paying specie on their notes when presented for payment, and were not specie-paying banks.

By a rebutter the bank accepted the issue tendered by the surrejoinders to her rejoinders, and the case was submitted to a jury on the issues thus formed.

A trial was had before the Hon. Morgan L. Fitch, then circuit judge, which resulted in a verdict in favor of the bank; when the court granted a new trial on the motion of the state,

Digitized by Google

on the ground of newly-discovered testimony. The bank filed exceptions to the grant of the new trial, but the decision of the court on the second trial, renders it unnecessary to state the proceedings at the first at greater length.

At the November term, 1845, of the circuit court, the Hon. Robert C. Perry, the former district attorney, having been elected judge of the district since the previous trial, was by consent of the bank, entered of record, permitted to preside as judge at the trial of the case, notwithstanding his having represented the state at the former trial. At the second trial, a verdict was on the 21st day of November, 1845, again rendered for the bank, and on the same day judgment according to the verdict was entered up. On the 26th of November, the state moved for a judgment in favor of the plaintiff, notwithstanding the verdict of the jury, which motion was overruled.

At the second trial, James Minter, a witness on the part of the state, stated that he was the owner of a part of the capital stock of the bank after the 15th day of February, 1838; that about the middle of March, in that year, he paid upon his stock an instalment amounting to something like or near the sum of five hundred dollars, that the payment was made in the notes of non specie-paying banks of this state; he believes they were the notes of the Commercial and Railroad Bank of Vicksburg, or of the Brandon Bank or Bank of Vicksburg, as he had no other kind of money at that time; that he paid the money to some officer of the bank at the counter of the bank; but he did not remember what officer nor who it was; that he received a certificate, did not remember who delivered it to him; he did not think he paid the money to Hughes, the cashier, though he was about the bank at the time. He knew when he made the payment that it was in violation of the charter; he had since sold his stock to Mr. Barksdale.

William Minter, on the part of the state, testified, that after the 15th of February, 1838, and in that year, he made a payment upon certain shares of the capital stock of the bank, held by him; that he paid the money to Hughes, the cashier of the bank; that it was at that time extremely difficult, and almost

Digitized by Google

impossible, to obtain specie in this state; before he made his payment he had an interview with Hughes, in which it was agreed between himself and Hughes, to obviate this difficulty in obtaining specie to be used in payment of his stock, and to evade the charter of the bank in making the payment, that the witness should procure the notes of the bank, and present them at its own counter; that the bank should receive the same, count out the amount in specie, and immediately take or receive the specie back again, without witness being at liberty to remove it from the bank, and that witness should thereupon receive a certificate for his stock, as paid; that he accordingly procured said notes, presented them at the counter of the bank; the teller of the bank, by the direction of Hughes, counted and placed some specie on the counter; the witness did not count it or superintend the counting of it; Hughes pointed to the notes and specie as they lay on the counter, and said to the teller that it was a payment upon the stock of the witness; the teller then removed the notes and specie from the counter; the witness thought the arrangement designed to evade the charter; he regarded the payment as in fact made in the notes of the bank; that the bank had previously suspended specie payment, and was then a non-specie paying bank; the amount he paid was about two hundred dollars.

H. I. Hughes was examined by the bank; he stated that he was the cashier of the bank from its first organization until in December, 1844; he transacted most of the business of the institution; there was an order of the board of directors for the government of the officers, that no payment for stock should be received in anything else than gold and silver, or the notes of specie-paying banks; this order was carried out, so far as he knew, to its fullest extent; that he never knew stock to be paid for in anything else than gold and silver or specie notes; that this rule was communicated to, and directed especially to be observed by, all the officers of the bank; he instructed the teller to comply with this rule strictly; the teller invariably received his instruction from the cashier; the cashier invariably received his from the board of directors; the board of directors never

Digitized by Google

revoked or changed this rule; that no payment, to his knowledge, of stock had been made since February, 1838, not in accordance with this rule, and the requirements of the charter; the principal part of the stock paid since then, was paid in Philadelphia in specie; that he recollected the transaction with William Minter; Minter had about two hundred dollars in the notes of the bank; the bank had suspended; Mr. Minter presented the notes; witness directed the teller to pay them; he did so and put them in the till; witness informed Minter that he could not receive payment in the notes of the bank; the specie was counted out by the teller on the counter, but not removed or counted by Minter; witness then pointed to the specie, and told Minter it was his money, and to do with it as he pleased; Minter then told the teller it was a payment on his stock; the teller removed the specie and applied it as a payment accordingly; witness regarded the arrangement as in conformity with, and not as an evasion or violation of, the charter; he had received payment for stock in the same way in twenty different instances; the bank had then $30,000 in specie in her vaults; he made no agreement with Minter to evade the charter, nor suggested such a thing; he was in the bank when James Minter made his payment for stock; but did not receive the money or see its character; it was paid to the teller, Mr. Garr; the sum paid was seven hnndred dollars; witness made out the certificate; and feels sure that no violation of the rule and instructions given took place on that occasion, because he believes that Mr. Garr would in that event have informed him of it; he was sure Mr. Garr adhered to the rule, because so directed, and from his general fidelity in business; witness was frequently absent for months from the bank; the board of directors, within witness' knowledge, were never informed of any payment of stock in any other mode than that pointed out by the charter, and never authorized or sanctioned payment in any other mode. The defendant then read the affidavit of James Minter, on the faith of which, made at the previous term, the court had granted the state a new trial; in that affidavit he deposed that he was a stockholder and an original subscriber to

Digitized by Google

the capital stock of the bank, and that *since the 22d day of March*, 1838, he had paid part of his subscription to her capital stock in notes of the banks of the state of Mississippi which were not paying specie at that time, and that such payment was made by him in the month of April or May, 1838.

The defendant then read to the jury a power of attorney from James Minter to Charles Griswold, dated June 19, 1838, authorizing him to sell and transfer on the books of the bank his twenty-five shares of stock to Robson & Allen; and also Griswold's transfer to Robson & Allen of the stock, as described by a certificate issued to James Minter, numbered 3, and dated March 15, 1838.

The state then proved by Mr. Barksdale, that he had, as agent for Robson & Allen, made the arrangement with Minter for the purchase of his stock, and had the power of attorney made to Griswold, to complete the sale, as the doors of the bank were then closed; that Minter did not know for whom he was buying it.

This being all the evidence in the case, the plaintiff moved the court to instruct the jury:

1. If the jury believe, from the evidence, that since the fifteenth day of February, 1838, the cashier, or teller, or clerks of said bank, as officers and agents of said bank, received either directly or indirectly from any one, the notes of non specie-paying banks, in payment for any part of the capital stock of said bank, they must find for the plaintiff.

2. If the jury believe from the evidence that since the 15th day of February, 1838, it was agreed between the cashier of said bank and William Minter, a holder of part of the capital stock of said bank, that said Minter, to make payment of his stock, and evade the charter of said bank, should procure the notes of said bank, which was then a non specie-paying bank, that said bank should receive said notes, count out their amount in specie, and immediately take or receive back said specie, without Minter being at liberty to take the same from the bank, and that he should thereupon receive a certificate for his stock as paid, and that said Minter did so pay an instalment on his stock and receive a certificate, they must find for the plaintiff.

3. That if the jury believe from the evidence that since the

Digitized by Google

15th of February, 1838, said Commercial Bank of Manchester, while she was a non specie-paying bank, redeemed for any holder or owner of her stock any of her notes in specie, with the understanding and agreement that the money paid him should be immediately returned to said bank in payment for the stock of such stockholder, and that the money so paid by said bank was so immediately returned in payment for stock, then they must find for the plaintiff.

These instructions were refused by the court; which, on motion of the defendant, gave the following charges to the jury.

1. That if the jury believe from the evidence that the Commercial Bank of Manchester has not taken in payment of stock, since the 15th of February, 1838, the notes of non specie-paying banks, then they must find for the defendant.

2. That the cashier, teller, and clerks of a bank are mere servants of the bank; and that their acts in violation of their instructions, and beyond the scope of their business and duty, without the knowledge or assent of the directory, and against the rules prescribed by the charter, the directory and the usage of the bank, are not binding upon the corporation, nor are they in law the acts of the corporation.

3. If the jury believe from the evidence, that the cashier, teller or other servant of the Commercial Bank of Manchester, did receive and take in payment of stock, since the 15th of February, 1838, the notes of non specie-paying banks, contrary to the charter and usage of the bank, and contrary to the express instructions given by the board of directors, and without the knowledge or consent of said directors, and without their subsequent knowledge and ratification or approval, such a taking was not a taking by the bank nor a cause of forfeiture, nor will it authorize the jury to find for the plaintiff.

4. That the Commercial bank of Manchester, during 1838, had a right to redeem her own notes by the payment of specie; that it was her duty under her charter to do so, and that the payment of her own notes or any portion thereof in specie was not a violation of her charter or any provisions thereof, and that the taking of said specie back again in payment of stock, was not in contravention of her charter.

Digitized by Google

5. That the suspension of specie payments by the Commercial Bank of Manchester did not relieve her from the liability to pay her own notes when presented in specie, and that such payment was not illegal or in violation of her charter.

6. If the jury believe from the evidence that William Minter offered to pay two hundred dollars on his stock since the 15th of February, 1838, in notes of the Commercial Bank, of Manchester, and that such payment was refused by the cashier, on the ground that it would be in violation of the charter and the instructions of the directory, and that said cashier, to accommodate said Minter, did pay him specie for said notes, and that then said Minter directed said specie to be received back in payment of his stock, and that such transaction was *bona fide* on the part of said cashier, and without any intention of violating the charter, then such transaction was not illegal, nor in violation of the charter, and does not constitute sufficient ground for the jury to find the issues against the defendant.

7. If the jury believe that a witness has sworn falsely in one matter, they have a right to disbelieve him as to all.

8. If the jury believe from the evidence, that James Minter did, after the 15th of February, 1838, pay to the teller of the Commercial Bank of Manchester, one instalment of his stock in paper of non specie-paying banks, and the teller did receive such notes in payment, in violation of the rule laid down in the charter, and in violation of his duty, authority, and instruction from the board of directors, and cashier, and without their knowledge and consent, and without their subsequent knowledge and approval, or that of either of them; such payment or receiving is not the act of the bank, and does not constitute a violation of the charter.

To the rejection of the instructions asked for by the state, and to the giving of those asked for by the defendant, the plaintiff excepted, and embodying the proof and instructions in a bill of exceptions, appealed to this court.

R. S. Holt, for appellant.

It was the duty of the circuit court to pronounce such a judgment as was proper in view of all the facts disclosed by the

Digitized by Google

record, whether those facts were admitted in the pleadings or ascertained by the verdict of the jury. Stephen on Pleading, 117, 118. 2 Tidd's Prac. 920.

1. The payment of stock in any other mode than in specie was utterly subversive of the objects of the charter, which were to afford a sound circulating medium, and afford safe commercial facilities to the community; and was calculated to totally defeat the purposes intended to be subserved by the charter, and therefore violated it; 15 J. C. R. 379; and having thus forfeited one of the conditions upon which the corporators held their franchises under the charter, they forfeited all their privileges. Angel and Ames on Corp. 662–3; 23 Wend. R. 193, 205, 573, 237, 245; 4 Gill and Johns. R. 121; 1 Black. (Ind.) R. 267.

It was admitted by the pleadings, that before the act of February, 1838, stock notes were given in lieu of specie in payment of stock. Was then that act a waiver of the previous forfeiture? We insist that it is not such a waiver.

On this point Mr. Holt cited the following authorities: 1 Bouv. Law Dic. 376; Toml. Law Dic. tit. Estoppel; 10 Vin. Abr. 421, 422; 4 Comyn's Dig. 200, 201; 2 Jacob's Law Dic. 114, 115; Greenl. on Ev. 34, 249, 250, 252; 1 B. & P. 203; 8 Wend. 483; 6 Term R. 220; 2 Phil. on Ev. 200, last edition; 5 N. Hamp. R. 452; 9 Cow. R. 274; 4 Wend. 642; 6 Pick. R. 455; 10 Vin. Abr. 423–4; Com. Dig. 201; 9 Wend. 381; *Jackson* v. *Sheldon*, 5 Cow. 448; 1 H. Black. R. 311; 6 Term R. 220; Adams on Eject. 193, 150; 1 Saund. R. 287, c. d.; 3 Term R. 151; Cowp. R. 803; *Hume* v. *Kent*, 1 Ball & Beatty, 554; 23 Wend. 193.

2. The instruction given to the jury that the reception of payments for stock, by the cashier or teller of the bank, in a mode different from that prescribed by the charter, was not within the scope of their powers, not binding on the corporation, and did not cause a forfeiture of the franchises.

We contend that the corporators were answerable for such acts done by the cashier and teller, from the necessity of the case and upon general principles. Story on Ag. 18, 103, 131; 1 Salk. R. 289; 3 Atk. R. 47; 23 Wend. 260; 2 Hill, 452; 1 Black. Comm. 430.

Digitized by Google

W. R. Miles, for appellee.

1. The motion for judgment *non obstante veredicto* came too late. Steph. on Pleading 129; 8 Taunt. R. 413; 3 Barn. & Ald. R. 702; 1 Barn. & Cres. 223; 2 Ib. 293, 302; 4 Ib. 138; Tidd's Prac. 712, 935; 6 Cow. 225.

2. Had the motion been in time, it would not have availed; the act of Feb. 15th, 1838, was a waiver of former forfeitures. 9 Wend. R. 351, 379, 380, 381; 23 Wend. 193, 212, 319, et seq.; 16 Mass. R. 245, 270, 710.

3. The servants or agents of the bank cannot, by violating instructions given, and acting beyond the scope of their authority, disfranchise the corporators. Ang. and Ames on Corp. 239, (2d edition); 8 Mass. R. 299; 5 Wheat. R. 337; 12 Ib. 40, 83; 3 Day (Conn.) R. 493; 1 Hill (N. Y.) R. 572; 1 Black. (Ind.) R. 273; 2 N. Hamp. R. 352; 7 Dana R. 28; 22 Pick. R. 24; 21 Ib. 270; 11 Serg. and Rawle, 267, 269; 17 Mass. R. 29, 30; 19 Pick. 516, 517; 7 Cow. R. 219; 1 Black. 190; 19 Pick. 517; Ang. and Ames, 250, 251; 1 Greenl. R. 81; 14 Mass. R. 58.

4. This case is such an one as when once fairly determined, should not be disturbed by granting a new trial, unless upon the clearest showing. 9 Johns. R. 264; 4 D. & E. 753; 5 Ib. 19; 6 B. & C. 566; 9 D. & R. 566; 2 Tidd's Pr. 941; *Brooke* v. *Middleton*, 10 East, 268; 1 Camp. 450.

George S. Yerger, on same side.

A charter is forfeited for abuse, or non-user. To constitute an abuse, it must be the act of the corporation, either in doing an act, which it is not authorized to do, and which is prohibited by its charter, or in not doing an act it is required to do.

The authorities on this point are believed to be all one way. To hold otherwise would be to make the act of forfeiture, not that of the corporation, but of some servant or agent, who could at any time, at his own will, cause a forfeiture.

The leading case is that of the city of London. Before this case it was considered doubtful, whether the corporation could forfeit for abuse, or non-user. That case shows it must be the act of the corporation.

Digitized by Google

If an act is done contrary to the charter, the act must be done by and with the authority of the corporation. The directory, by law and by the charter, can only act so as to bind the corporation. The cashier and teller act as their agents, and under their direction, and their acts, in contravention of the orders of the directors, are not the acts of the corporate body. If they were, every corporation is at the mercy of its servants or sub-agents, who act without authority.

Acts of a negative character, as when the corporation are required to act, and they neglect to do so; this neglect is the act of the whole body, because they are required to act, and do not.

In all cases, therefore, where the corporation is charged with doing a thing prohibited to them, it must appear that it is the act of the corporation. 2 Bac. Ab. 285, note, case of City of London; 23 Wend. R. 581, 582, 586; 13 Lou. R. 270. The *quo warranto* act requires it to be the act of the corporation. See acts of 1843.

The same rules apply to forfeiture of corporate rights that do to forfeiture of estates. 9 Wend. 351; 23 Ibid. 586.

If a person without authority, or a stranger, commit waste, it is not a forfeiture. 23 Wend. 587.

As to the power of the directory, and that it is their acts which constitute the acts of the corporators, &c. See Angel & Ames, 211–214; 2 Metcalf's R. 163; 11 Mass. R. 288.

2. The ninth replication alleges that in 1837 and 1839, it failed to pay specie. The bank rejoined, and set out the act of 1840, which waived this, and averred a compliance with its provisions, and that it has paid specie ever since.

That the legislature had the right to waive the forfeiture is undoubted law; and that the act of 1838 is a waiver, see 5 Mass. R. 232; 9 Ohio R. 203; 13 Lou. R. 203; 9 Wend. 351; 9 Connecticut, 45; 4 Gill & Johns. 122, 127; 2 McMullen's R. 451.

3. To the thirteenth replication there is a demurrer. The replication avers that the bank loaned to Pope money, at less than twelve months, and took real estate as a pledge, or secu-

Digitized by Google

rity; for its payment. This it was authorized to do, both by its charter and by the law. *Nolen* v. *The Commercial Bank of Manchester*, 7 How. Reports.

5. The third instruction was properly refused, for two reasons. 1st. Because the bank was bound by her charter to pay specie at all times, therefore she had a right to pay her notes to a stockholder as well as any other, although she knew he intended to pay his stock with the silver.

But 2d. This instruction was properly refused, because it asks for a mere abstract principle of law, and whether right or wrong the case cannot be reversed, for the evidence shows that it was the cashier who paid the notes and took back the silver, in payment of stock; and the evidence further is, that the bank knew nothing of it, that is, the directors.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This was an information, in the nature of a *quo warranto*, instituted under the act of 1843, against the Commercial Bank of Manchester. To the information the corporation pleaded the charter, to which there were fourteen replications. A trial was had at the May term, 1845, of the Yazoo circuit court, which resulted in a verdict for the defendant. On the part of the state a new trial was moved for, on the ground of newly discovered evidence, which was granted; but the defendant excepted to the decision of the court in granting the new trial. The next trial also resulted in an acquittal of the bank, and the case comes up by writ of error on exceptions taken by the district attorney, during the progress of the trial.

The replications were all abandoned except the second and fourteenth, and the questions to be determined, arise under those replications.

The second replication is, in substance, that the subscribers failed to pay the first, second, and third instalments for stock, but gave notes for the amounts due, which were discounted by the bank fraudulently, and with intent to evade the charter, and the proceeds placed to the credit of the subscribers. To this replication the defendant rejoined, that since the making

Digitized by Google

and discounting of such notes, to wit, on the 15th of February, 1838, with full knowledge that such notes had been taken in payment of stock in lieu of money, the legislature passed an act continuing said corporation, entitled "an act reducing the capital stock of the Commercial Bank of Manchester, and for other purposes." The act is set out at length, and it is averred that the legislature thereby waived the said cause of forfeiture, and that the bank has not, since the passage of said act, received anything but gold and silver for stock.

The fourteenth replication contains a general allegation that the subscribers for stock had wholly failed to pay as the charter required, and that such failure was with the consent of, and by contract with the corporation. To this the defendant rejoined the same act of the legislature, with the same averments contained in the rejoinder to the second replication.

The case having been submitted to the jury, the district attorney, on the part of the state, requested these charges, to wit: 1st. "If the jury believe, from the evidence, that since the 15th of February, 1838, the cashier, or teller, or clerks of said bank, as officers and agents of said bank, received either directly or indirectly from any one, the notes of non specie-paying banks, in payment for any part of the capital stock of said bank, they must find for the plaintiff."

2d. "If the jury believe, from the evidence, that since the 15th day of February, 1838, it was agreed between the cashier of said bank and William Minter, a holder of part of the capital stock of said bank, that said Minter, to make payment of his stock, and evade the charter of said bank, should procure the notes of said bank, which was then a non specie-paying bank; that said cashier should receive said notes, count out their amount in specie, and immediately take or receive back said specie, without Minter being at liberty to take the same from the bank, and that he should thereupon receive a certificate of stock, and that said Minter did so pay an instalment on his stock, and receive a certificate, they must find for the plaintiff." The third charge presents, in substance, the same proposition. At the request of the defendant the court gave several charges

Digitized by Google

to the jury, and the plaintiff excepted to these several decisions of the court in refusing and giving the charges.

It is thus sure that two questions are presented. 1st. Was the act of the 15th of February, 1838, a waiver of the previous cause of forfeiture; and 2d. Did the court err in refusing to give the charges asked by the district attorney, and in giving those asked by the defendant?

The question of waiver is raised by a motion for judgment *non obstante veredicto*, predicated on the admission in the rejoinder, that the bank had, prior to the act of February, 1838, forfeited its charter, and that the forfeiture was not waived by the act.

The verdict and judgment seem to have been rendered on the 21st of November, 1845. On the 26th of the same month the district attorney moved to set aside the judgment, and for judgment *non obstante veredicto*, which was overruled. It is now objected that this motion was too late after judgment entered. That, like a motion in arrest of judgment, it must precede the entry of judgment, it being too late to arrest that which is already entered. This objection is quite technical, and yet it is in strict accordance with law. The objection is made, and there seems to be but one rule on the subject; and that is, that such a motion must be made immediately after the verdict, and before a judgment is rendered on the verdict. 2 Tidd's Practice, 840.

We proceed then to the consideration of the charges of the court. Corporations, from their nature, act by agents. They can act in no other way. The directors are but agents; but as the business of the corporation is conducted by them, their acts are regarded as corporate acts. But the sub-agents are subject in their transactions to the general rules of agency, as applicable to the agents of individuals. Their unauthorized acts do not in general bind the corporation, unless they have been acquiesced in. The first charge was evidently too broad. It cannot be that a banking corporation is left, in all respects, entirely at the discretion of all its agents or servants. The charge asked contains the broad proposition, that payments for stock may be

Digitized by Google

made to the cashier, teller, or any of the clerks, without any proof as to their authority to receive such payment. In the management of a corporation, different duties are assigned to different agents. It cannot be law that the whole machinery may be managed by any or all of the agents indiscriminately. To make a payment binding on the corporation then, it should be made to some agent who is authorized to receive payments. But the charge goes further. It would make any payment, made directly or indirectly, to any of the officers, binding on the corporation. This would extend to out-door transactions of an infinite variety of forms. It is sometimes customary for banks to employ messengers to deliver notices; if the charge asked be law, a payment made to such messenger, in the course of his daily excursions, would be binding on the corporation. On this hypothesis, every agent employed by a bank, may bring about a forfeiture of the charter.

The second charge asked is more limited. It confines the alleged illegal transaction to a contract or agreement made with the cashier. If the acts of the cashier are in all cases to be regarded as the acts of the bank or corporation, then it must be conceded that this charge should have been given. We have said that the cashier is but the agent of the corporation; and that his power is to be determined by the same rules which apply to agents in general. The general rule is, that if an agent exceed his authority, his acts are not binding on his principal. This particular description of agency has been the subject of frequent adjudication, and the question must be regarded as in a great degree settled. The power of the cashier of a bank was considered by the supreme court of the United States, in the case of *Fleckner* v. *The Bank of the United States*, 8 Wheat. 338. The cashier had transferred a promissory note by indorsement, and his right to do so was questioned. Judge Story thought it necessary to make an argument of some length to show that he had power to indorse a note, and that too after such indorsement had been sanctioned by a vote of the board of directors. In speaking of the power of the cashier, the court said, "he is considered the executive officer, through whom, and by whom,

Digitized by Google

the whole moneyed operations of the bank in paying or receiving debts, or discharging or tranferring securities, are to be conducted. It does not seem too much, then, to infer, in the absence of all positive restrictions, that it is his duty as well to apply the negotiable funds, as the moneyed capital of the bank, to discharge its debts and obligations." The qualification under which this general power is conceded to the cashier, is striking and not to be overlooked. The power can only be exercised "in the absence of all positive restrictions." The language admits of no other meaning than, if such restrictions do exist, then they limit the power of the cashier. As the cashier is held out to the world as the general agent of the bank in regard to its funds and securities, *prima facie* he is to be deemed as having authority to superintend the moneyed affairs, and no special authority need be proved. But if a bank chooses to limit his authority, it certainly has the power to do so. 3 Mason's R. 506. This power results necessarily from the superior authority of the directors. The corporate functions are concentrated in them; the cashier is but an agent of their appointment. His duty is not prescribed by the charter, but originates with the directors, and may be extended or limited as they may think proper. From the general character of the agency, it may be incumbent on the bank to show the restriction or limitation. This does not change its effect when shown.

The case of *Wyman* v. *Hallowell and Augusta Bank*, 14 Mass. R. 58, is a decision to the same effect. A new bank was chartered by the same name with a previous one, and employed the same president and cashier. Affidavits were read tending to prove, that the new corporation had put in circulation the notes of the old one; and the cashier had declared that there was no difference between the notes of the old and the new corporation, upon the faith of which declaration the notes obtained currency. It was held that the officers who had so undertaken to pledge the credit of the bank, had acted unwarrantably, and could not implicate the stockholders or company, who are supposed to rely upon the faithful and correct discharge of duty by their agents and servants. The stockholders, said the court,

Digitized by Google

would be in an extremely unsafe situation, if their property was bound by the irregular transactions, or by the declarations or confessions of their officers, beyond the legal sphere of their action.

It cannot be denied that the acts of the cashier of a bank, performed within the sphere or scope of his duty, are binding on the corporation. But what is the sphere of his duty? It extends no doubt to all acts which peculiarly pertain to his office, in the absence of any express regulation. But if there be an express regulation, that of course limits the sphere of his action. The directors may prescribe every duty he shall perform, and the manner of its performance, and the sphere of his authority is then confined within the limit so prescribed. And his authority may be from time to time changed or restricted.

This question as to the power of a cashier to bind the corporation, was again raised before the supreme court of Massachusetts, in the case of *Salem Bank* v. *Gloucester Bank*, 17 Mass. R. 28, and the court said, "The directors are the agents of the company; the officers are its servants. The duties of both are pointed out by statute, or prescribed in the by-laws, which are the promulgated will of the company. Acting within the limits of the authority thus given, the company is liable for their acts; but beyond those limits, they cannot bind their principals." And again, in the case of *Foster* v. *The Essex Bank*, 17 Mass. R. 505, it was said the cashier could not, by his undertaking, make the bank answerable for a deposit, contrary to its usage, without previous authority or subsequent assent.

In the case of *Everett* v. *The United States*, 6 Porter's Alab. R. 166, the transfer of a promissory note by the cashier of a bank, was sustained on the ground that it was within the scope of power ordinarily conferred upon the cashier, and yet the court admitted that the inference would not be conclusive; that it would be competent to show that the indorsement was made in prejudice of the rights of the bank, in which case it would not be a valid transaction.

This question is very fully considered in the Treatise on Corporations, by Angel and Ames, 239, et seq., where the doctrine

Digitized by Google

of the foregoing cases is fully recognized, and no case has been found which holds the contrary. Many other decisions are there referred to in support of the same doctrine. The result of all these authorities seems to be that bank officers, acting within the scope of their power, may bind the corporation; that the acts of the cashier, who is the general executive officer of the bank, are *prima facie* binding when performed in the discharge of the ordinary duties which belong to that officer, and that in order to avoid such acts, it devolves upon the corporation to show a special restriction. And I go further; the restriction must not arise from the charter alone, but from a limitation imposed upon the cashier by the directors. Through the cashier the directors may doubtless violate the charter, unless they can show that he departed from his duties, as prescribed by them. But it is believed to be a clear and indisputable principle, that the cashier cannot cause a forfeiture of the charter by a direct and palpable violation of his authority or instructions. We repeat that the scope of his duty is limited by the regulations of the directors. They may confer on him, or permit him to exercise, the powers which are usually exercised by cashiers, and then his acts will be binding, but they may limit his power if they think proper. If they cannot do so, his authority is superior to theirs, and the franchise is placed entirely at his mercy. It was remarked, in one of the cases referred to, that there is a difference between the acts of a bank officer and a mere private agent in this, that persons dealing with a bank are presumed to know the extent of the agency, because it is limited by the charter, or by the proceedings of the directors, which are subject to the inspection of every one.

According to this view of the authorities, the charge asked does not accord with the law. Some qualification should have been added, to indicate to the jury that if the act of the cashier was in direct violation of the express instruction of the directors, the corporation was not bound by his acts. This was necessary, because the proof was explicit, that the board of directors had given positive directions that nothing but gold or silver, or the notes of specie-paying banks should be received in payment

Digitized by Google

of stock, and charges must be given with reference to the evidence before the jury. There was no proof tending to show that the directors had acquiesced in any violation of the charter, if any such occurred, or that they even knew of the commission of such violation. If, under such circumstances, such an act as that referred to in the charge, be binding on the corporation there can be no limit to the power of the cashier. He may forfeit the charter, sell its property, or squander its money at pleasure. By the 7th section of the charter, the power to appoint and remove all officers, clerks and servants, is expressly conferred on the corporation, and the charter being silent as regards the duties of the cashier, it results that he derives his authority from the directors, by whom it may be limited.

We think, therefore, that the judgment must be affirmed.

Digitized by Google

JAMES E. BLACK et al. *vs.* SIMEON C. BARTON, Executor of Felix W. Baird, deceased.

If an executor, against whom, as such, various judgments have been obtained, use the assets of the estate of his testator in the payment of the junior judgments against him as such executor, leaving the eldest judgment unpaid, he will be guilty of a *devastavit*; and will be liable to a proceeding against him by *scire facias*, as such executor, to subject him to the payment *de bonis propriis* of the judgment recovered against him as executor and thus left unpaid.

In such case the *scire facias* should state what amount of assets had come to the hands of the executor, as he would not be liable beyond that sum.

The executor may plead to such *scire facias* notwithstanding the former judgment against him, *plene administravit*; and will be discharged if he can show a full and proper administration of the estate; such plea will not, however, be supported if there has been a misapplication of assets.

IN error, from the circuit court of Hinds county; Hon. John H. Rollins, judge.

On the 9th day of June, A. D. 1841, the following *scire facias* issued from the clerk's office of the circuit court, viz.: "To the sheriff of Hinds county, Greeting: Whereas in our circuit court of said county, on the 27th day of June, 1837, by the consideration of said court, James E. Black and John Robinson, merchants and partners, trading as Black & Robinson, recovered against Simeon C. Barton, executor of the last will and testament of Felix W. Baird, deceased, the sum of three hundred and twenty-seven dollars sixty-four cents, for the damages which they have sustained by reason of the non-performance of a certain promise of assumption by the said testator to the said plaintiffs lately made, with interest on said sum at eight per centum per annum from the said 27th day of June, in the year of our Lord one thousand eight hundred and thirty-seven until paid, also the sum of $19,37 costs in that behalf expended, whereof the said defendant is convicted as appears to

Digitized by Google

us of record; and whereas a *fieri facias* issued thereon to you directed against the goods and chattels of said testator in the hands of Simeon C. Barton, executor, returnable on the second Monday after the fourth Monday of October, 1837, which was returned into our circuit court of Hinds county, on the 6th day of November, 1837, that there were no goods and chattels to be found in your county whereby the above sums could be made, or any part thereof; and whereas, it having been suggested to us that judgments obtained subsequently have been paid and satisfied since the rendition of said judgment: Now, therefore, we command you to make known to the said Simeon C. Barton, executor of the estate of Felix W. Baird, deceased, to be and personally appear before the circuit court of Hinds county on the 3d Monday of June, 1841, to show cause, if any he can, why the judgment obtained against him as executor of said Felix W. Baird, should not be made up against him, and execution thereon issue against him for the amount of said judgment, damages and costs, because of his paying off and satisfying junior judgments rendered in the circuit court of said county, which are of record in said court, to the detriment and prejudice of said plaintiffs' judgment. Witness, &c."

A demurrer was filed to this *scire facias*, for the reasons that it did not show a sufficient ground of a *devastavit;* was not formal; or in accordance with the statute. The court dismissed the *scire facias*, and the plaintiffs therein prosecute this writ of error.

Davenport and *Greaves*, for plaintiffs in error.

S. C. Barton, for defendant in error.

The action of debt, or *sci. fa.* suggesting a *devastavit* against the principal only, or principal and securities in the bond until the whole penalty thereof, &c., be recovered, is given to creditors of deceased persons against their legal representatives. See How. and Hutch. 417, sec. 111.

In England, since the statutes of mortmain, the sheriff, after failing to make money out of property of decedents supposed to

Digitized by Google

be in the possession of the legal fiduciant, was then ordered to hold an inquisition, which, if found favorable to the plaintiff, the representative was cited or noted to attend court on the return of the inquest, and show cause why execution should not be had against him, if not enough, to the amount of inquest found, suggesting a *devastavit*, that the defendant eloigned, sold and to his own use converted and disposed of decedent's estate, &c.; and on return thereof into court, the defendant might tender an issue, &c. 1 Saund. R. 304.

In England assets are applied, 1st. To the payment of funeral expenses and probate of the will or of letters of administration. 2d. Those due to the crown by record or specialty. 3d. Debts created by statute. 4th. Debts of records in general. 5th. Debts due by specialty, and 6th. Debts due by simple contract. And if the legal representative pay those of a lower degree first, on a deficiency of assets he must pay those of a higher degree out of his own estate. Toller's Law of Executors, 258. Judgments of the like kind have no priority, and the executor may pay which he pleases first, and on *sci. fa.* against him, may plead fully administered, and show that the assets are exhausted in paying debts of a higher degree. Toller's Ex. 264, 267.

Our statute requires the expenses of the last sickness, including the doctor's bill, to amount of $25 and funeral expenses, to be first paid. See H. & H. sec. 80, 107, Probate Laws. Also debts due the United States. See Ingersoll's Abr. 156, 564; and 2 Cranch, 358, in case of *United States* v. *Fisher*.

The above only are privilege claims, and all other debts may be properly classed on an equality, leaving the executor here to pay which he pleases, as it does in England of judgments of the like kind.

A *sci. fa.* is a judicial writ, and in law is an action. See 2 Saund. R. 6, 71, and 1 How. R. 267, 271. All actions should be certain to a common intent, so that the defendant may plead an issuable plea, knowing with certainty what he is called upon to answer.

The *sci. fa.* in the present suit suggests that the defendant,

Digitized by Google

as Baird's executor, has paid a younger judgment than the plaintiffs', and that it is a *devastavit*. A younger judgment may have been paid, founded on a privilege claim, or on an older account than the account on which the plaintiffs' judgment is founded, or a younger account or note, and yet no *devastavit* committed. Or, supposing the estate be insolvent and in the hands of commissioners, the payment of a debt by the executor would not render him liable to pay thereby other debts out of his estate.

I have been unable to advert to a single case that will support the plaintiffs' action where the laws are similar to ours. I am yet to learn that the payment of just judgments, whether older or younger, against an executor as such, in Mississippi, is wasting the decedent's estate, when all privilege claims have been previously settled.

A *devastation* may be defined to be the legal receipt of effects of decedent's estate, and the failure to make a legal disposition thereof in due time.

There is another cause of error assigned; but being only a technical one, I shall pass it lightly over. It is the duty of the pleader, when making a previous judgment the foundation of a new action, to declare that the previous judgment is neither reversed, satisfied or annulled, but remaining in full force; which the *sci. fa.* in the present case does not state.

Mr. Justice CLAYTON delivered the opinion of the Court.

This was a *scire facias* against Barton, as the executor of Felix W. Baird, deceased, to subject him to the payment of a judgment *de bonis propriis*, which had been recovered against him as such executor. The ground relied on for rendering him liable, was that he had applied the assets of the estate to the payment of younger judgments, and left this unsatisfied. There was a demurrer to the *scire facias*, which was sustained by the court below, and the case dismissed.

The *scire facias* is informal in its structure, yet it is not so wholly defective as to authorize its entire rejection. The demurrer admits the facts charged. If they be true, the defend-

Digitized by Google

ant committed a *devastavit* in the appropriation of the assets. By the laws of this State, if there were not assets sufficient to pay all the debts, it was his duty to have suggested the insolvency of the estate, and to have applied them ratably to their satisfaction. The judgment was notice to him of the claim, and it was certainly not legal or proper to pay other judgments to the exclusion of this. This was a proper remedy equally with an action of debt upon the bond. 2 Lomax on Executors, 450; *Hoggatt* v. *Montgomery*, 6 How. 100.

The *scire facias* in this case, although it avers a mal-appropriation of assets, which is admitted by the demurrer, does not aver that enough came to the hands of the executor to pay the full amount of the judgment. It would not be right, therefore, to render judgment upon the *sci. fa.* for the full amount, because the plaintiffs are not entitled to judgment beyond the amount of assets. Neither is the defendant precluded by the former judgment from showing a full and proper administration of the estate; as he may still plead *plene administravit.* This is the rule adopted in Virginia under a statute from which ours is a copy. 2 Lomax, 452. Such plea, however, cannot be supported, if there has been a misapplication of assets.

The judgment will be reversed and cause remanded.

Digitized by Google

ROBERT ANDERSON et al. *vs.* URIAH TYSON.

In an action of replevin under the statute of 1842, a judgment in favor of the plaintiff for so much money, is erroneous; it should be in the alternative, for the property, if to be had, if not, then for its value.

The judgment in replevin, if in favor of the plaintiff, where the defendant has elected to give bond and retain possession of the property, should be entered against both principal and surety in such bond.

ON appeal, from the Panola circuit court; Hon. James M. Howrey, judge.

Uriah Tyson filed in the clerk's office, an affidavit that Robert Anderson and John Simmons wrongfully detained from his possession, five bales of cotton, to the possession of which he was legally entitled, and his right of action for which had accrued within a year.

A writ of replevin issued upon this, and the property was seized by the sheriff, but was restored to the defendants upon their entering into bond according to the statute. After the mistrials the jury, on a third trial, found for the plaintiff Tyson, and assessed his damages at $106 80; the judgment of the court was in accordance with the verdict; "that the plaintiff recover of the defendant, the sum of $106 80, assessed by the jury, together with his costs." From this judgment the defendants appealed.

D. C. Glenn, for appellant.

The error complained of in this case is very apparent; the writ of replevin was for five bales of cotton; defendants had levied upon this cotton with an attachment for rent; this writ was then sued out under, and in compliance with the late act of the legislature. Acts of 1842, 124. Upon issue joined, judgment went for the plaintiff, and was rendered for $106 80 damages. This was clearly erroneous; the act provides that

Digitized by Google

when the property is left in possession of defendant, and plaintiff recovers, (as in this case) the judgment of the court shall be against the defendant and his securities, that they restore the property, or pay the value to the plaintiff, as assessed by the jury, and also damages as assessed for wrongful detention. Acts of 1842, ch. 15, sec. 5. According to the act, the judgment should be in the alternative, here it is single; by the act, it should be against defendant and his securities, here it is against him alone; by the act, it is required that the value of the property and also damages for the detention both be assessed, here a simple sum is assessed, it does not appear for what. In fact it is no judgment according to law.

Per Curiam. This was an action of replevin, brought by the defendant in error, for five bales of cotton. The jury found in his favor for the sum of $106 80. The property had been permitted to remain in the hands of the defendants below, on their giving bond. The jury should have found for the plaintiff, and assessed the value of the cotton, and the judgment should have been in the alternative against the principal surety for the cotton if to be had; if not, then for the value thereof. This is the direction of the act which gives the action of replevin. Acts of 1842, 124, sec. 5. The judgment is for so much money, the defendant cannot therefore deliver the property in satisfaction.

Judgment reversed, and cause remanded.

Digitized by Google

CHARLES J. SEARLES et al. *vs.* JOHN D. SCOTT, Administrator of J. Silverberg.

The probate courts in this state have no power to appoint a receiver in any case.

Where, upon the death of one partner, the survivor assigns to a trustee partnership effects to secure creditors, the administrator of the deceased partner cannot implead the surviving partner and the trustee in the probate court, to compel them to account for the effects thus transferred.

In such case, the probate court would have jurisdiction of neither the persons, nor the subject-matter.

ON appeal, from the probate court of Madison county; William S. Bailey, judge.

At the February term, 1843, of the probate court, John D. Scott administrator *de bonis non* of the estate of Johnson Silverberg, filed a bill against Charles J. Searles and Alfred T. Moore, alleging, in substance, that his intestate was until within a short period of his death, engaged in partnership in the mercantile business with Searles, under the firm of J. Silverberg & Co., which was dissolved by mutual consent. That Searles and Michael Vanderhurst administered on Silverberg's estate until the death of the latter, when Searles resigned his letters, and the complainant was appointed *de bonis non*. That Silverberg and the said Vanderhurst, under the firm of M. Vanderhurst & Co., were also engaged in partnership in a similar business until its dissolution shortly before Silverberg's death; that of the firm of J. Silverberg & Co., Silverberg had all the capital, and was to have two-thirds of the profits; that by agreement between the partners, Silverberg was to have control, and settlement, and ownership of all the effects of the firm after the dissolution of each, both of J. Silverberg & Co., and of M. Vanderhurst & Co. That Searles and Vanderhurst

Digitized by Google

bought out J. Silverberg & Co., and united in partnership, executing their joint notes for $40,000, to Silverberg, for the purchase-money. That said Searles and Alfred T. Moore have in their possession all the books, accounts, notes, and choses in action of the two firms in which Silverberg was a partner, and also many of those belonging to Silverberg individually; that Searles had made to Moore a fraudulent assignment of all the debts due J. Silverberg & Co., and M. Vanderhurst & Co., and many due Silverberg individually; which assignment, with a schedule of the debts, was exhibited with the bill. That Searles and Moore had collected, assigned, and used various of these debts with a view of defrauding Silverberg's estate; that they are insolvent, and Searles's sureties on his administration bond are insolvent.

The prayer of the bill was that Searles might produce the books, notes, &c. of the respective firms; have a full accounting of what he had collected and used; and be compelled to deliver to the complainant all the books, notes, and accounts left undisposed of in which J. Silverberg, either as partner or individually was interested. That a similar order might be made with reference to Moore, and he also be compelled to exhibit the condition of the claims in his hands, and be compelled to account fully; and that an injunction &c., might issue.

Searles and Moore both answered the bill in detail; but it is not deemed requisite to set their answers out in full. They denied all fraud.

At the July term, 1843, Scott moved that John T. Cameron, the clerk of the probate court, be appointed a receiver of the books, and other evidences of debt due the firm of J. Silverberg & Co., until the final determination of the cause.

The order was granted in these words: "Ordered by the court, that this motion be sustained, and that the defendants, Searles and Moore, deliver to John T. Cameron, who is hereby appointed a receiver for the safe keeping of the same, all the books, notes, accounts, and other evidences of debt belonging to the estate of J. Silverberg, deceased, and to the late firms of

Digitized by Google

J. Silverberg & Co., and M. Vanderhurst & Co., which are now in their possession, and that they pay over to the said Cameron any money they may have on hand, of the separate estate of said Silverberg, or belonging to either of said firms; and also any moneys the said Searles and Moore, or either of them may hereafter collect belonging to said estate, or either of said firms; or claims now in process of collection. Said books, notes, accounts, and other evidences of debt and money, to be held by said Cameron, to abide the final decision of this cause."

From this order Searles and Moore appealed.

A. H. Handy, for appellants.

This case presents two questions: 1st. Has the probate court the power to appoint a receiver? And 2d. Is this a proper case for the exercise of that power?

1. The appointment of receivers is a power peculiar to the courts of chancery. In England, the ecclesiastical courts exercised no such power, and whenever its exercise became necessary for the protection of the decedent's estate, the aid of chancery was invoked; as where an executor became bankrupt, the court of chancery was called upon to appoint a receiver of the estate. Toller on Exec. 488.

The appointment, by the spiritual court, of an administrator *pendente lite*, is entirely different from the appointment of a receiver. Such an administrator was nothing more than the administrator *ad colligendum* under our statute. And even when an administrator *pendente lite* had been appointed, the court of chancery had to be resorted to when a receiver was required. *Atkinson* v. *Henshaw*, 2 Ves. & Beam. 85.

2. The probate court had no such power in the case presented. It had no power over Moore, because he was a mere stranger to the court, in no wise amenable to its jurisdiction. It had none over Searles, because, 1st, as administrator, he had passed his final account, and been discharged. His official relation to the court had ceased with the discharge, and with it the power of the court over him. *Green* v. *Tunstall*, 4 How. 638. 2d, Because the notes and claims assigned by him, are shown

Digitized by Google

by his answer to have belonged to him as surviving partner of Silverberg, and were assigned by him, for the purpose of paying the debts of the firm. This he had a perfect right to do, as is fully settled in a case between these same parties, and upon the same subject-matter, decided at January term, 1845. *Egbert* v. *Woods*, 3 Paige Ch. R. 526; 1 Brock. R. 462; Collyer, 63, n. 17, 131, n. 40.

Scott and *Calhoun*, for appellee.

1. The court of probate has the same power with the ecclesiastical courts in England. The latter courts have power to appoint a person to take care of the property while a contest is going on therein, for the right of administration to an estate, who was commonly called an administrator *pendente lite*. *Ball* v. *Oliver*, 2 Ves. & Beam. R. 95; *Atkinson* v. *Henshaw*, 2 Ib. 85; *Knight* v. *Duplessis*, 1 Ves. R. 324; *Richards* v. *Chase*, 12 Ib. 462; *Walker* v. *Wollaston*, 2 Peere Wms. R. 576.

2. The ecclesiastical court has power in England to appoint temporary and limited administrations for any special purposes. 1 Williams on Ex. 320, 331. This power would embrace the power given by our statute, to appoint an administrator *ad colligendum*; but it seems to us, that any of these powers are equivalent to the power to appoint a receiver.

3. Independent of this view, the statutes of the state authorize the appointment of a receiver. H. & H. 399, § 48; Ib. 403, § 64; Ib. 407, § 74.

4. It is said Searles and Moore not being administrators, are not amenable to the jurisdiction of the court. As executors *de son tort*, in which light they may be regarded, they are liable to all the remedies which exist against a regularly appointed administrator. 1 Will. on Ex. 141.

5. It is too late, after answer, to raise the question of jurisdiction. *Cable* v. *Martin*, 1 How. Rep. 561; 2 Johns. Ch. Rep. 369; 4 Ib. 290. If it had jurisdiction, the court could appoint a receiver, which seems to have been the opinion of the late chancellor; *Simmons* v. *Henderson*, Freem. Ch. R. 501.

Digitized by Google

6. Where fraud, waste, insolvency, or danger of irreparable mischief is alleged, a receiver is always appointed. *Ball* v. *Oliver*, 2 Ves. & Beam. 95; Mit. Pl. 122; Eden on Inj. 135; *Boyd* v. *Wickham*, 3 Johns. Ch. R. 48. Fraud and insolvency both exist in this case.

Per Curiam. It seems that Johnson Silverberg, in his lifetime, was a member of two mercantile firms. After his death his partners administered, and settled up the administration accounts. Searles, as a member of the partnership, assigned, as it is alleged, a large amount of notes and accounts to Moore, for the benefit of creditors, and this proceeding was instituted by Scott, as the administrator *de bonis non*, to compel Searles and Moore to account for the effects. After the defendants answered the petition, the plaintiff moved the probate court for an order on Searles and Moore, to compel them to deliver up the books, and other evidences of debts due the firm of J. Silverberg & Co., and to appoint a receiver, which motion the court sustained.

The court had no jurisdiction either over the subject-matter or the persons. Moore was a mere trustee, and Searles was entitled to control the effects of the firm as surviving partner. This is not an appropriate remedy for an administrator, in reference to partnership effects. But even if the subject-matter and the persons had been subject to the jurisdiction of the court, it has no power to appoint a receiver in any case; and much less in such a case as this. The probate courts may, in certain cases, appoint administrators *ad colligendum*, but a receiver is quite a different officer. The court had no power to appoint an administrator *ad colligendum* in this case, because there was an administrator in chief.

Judgment reversed.

Digitized by Google

L. B. Wright et al. *vs.* The Bank of Alabama.

In an action upon a judgment rendered in another state, if the bill of exceptions taken to the admission of the record in evidence, does not embody the record itself, this court will not notice it, even though a record answering the description of the one sued on is inserted by the clerk in the transcript for this court.

Where a bill of exceptions is taken to the admission of a deposition, on the ground that it was a deposition not taken in the pending suit, but in another suit between the same parties, and the deposition is not inserted in the bill of exceptions, this court will not disturb the verdict.

Where a bill of exceptions is taken to the refusal of the court to grant a new trial, but does not embody the evidence, or set forth any thing upon which the court can act, the judgment of the court below will be affirmed.

HARVARD LAW SCHOOL LIBRARY

In error from Panola circuit court; Hon. James M. Howrey, judge.

The President and Directors of the Bank of the State of Alabama, sued Little Berry Wright, Michael Wright, and Jesse C. Wright, in an action of debt founded on a judgment of the county court of Tuscaloosa county, in the state of Alabama. The defendants plead, 1. *Nul tiel* record. 2. That the plaintiffs had sued the defendants previously in the same court, in an action of assumpsit for the same cause of action and a judgment had been rendered in their behalf.

Issue being taken on these pleas, the first was submitted to the court, which gave judgment for the plaintiffs; and the second to a jury, which rendered a verdict for the plaintiffs.

The record contains the following bills of exceptions, viz.:

"Be it remembered that on the trial of this case before the Honorable James M. Howrey, judge of the 8th judicial district of said state, sitting for the county of Panola, at May term, 1845; the defendants moved to exclude the record in this case,

Digitized by Google

under the plea of *nul tiel record*, which motion was overruled by the court and the record permitted to be read, to which the defendants except, and pray that said plea and record be made a part of this his bill of exceptions. The plaintiffs also offered to read the deposition of William Horne, that was taken and read upon the trial of another cause between the same parties, in this court, which was objected to by the defendants, and the objection overruled, and the deposition permitted to be read to the jury; to all of which the defendants except, and pray that said bill of deposition be taken as a part of this his bill of exceptions, which is signed, sealed and made part of the record before the jury retired, &c."

"Be it remembered that after the finding of the jury in the above case at this term of the court, the defendants moved the court to set aside the judgment and grant a new trial for the reasons stated on the motion docket, which motion was overruled by the court, to all of which the defendants except, and pray, &c."

There were transcribed in the record the transcript of a judgment answering to the one on which the action was brought; and also a deposition similar to that described in the first bill of exceptions, but neither the record nor deposition was included in the bills of exceptions, nor otherwise referred to than by the prayer that they might be made parts of them.

When the motion for a new trial was overruled, the defendants sued out this writ of error.

Harrison and *Vance*, for plaintiffs in error.

C. Miller, for defendants in error.

1. No ground of objection to the admissibility of the record is set forth in the bill of exceptions, and as the record in question is not incorporated in this record, this court cannot but presume that it was properly introduced and read in evidence.

2. The only ground of objection taken to the deposition is found in the first bill of exceptions, in the following words, viz.: "The plaintiffs also offered to read the deposition of William

Digitized by Google

Horne, that was taken and read upon the trial of another cause between the same parties in this court." Now it is well established that these are not valid objections. A deposition taken in one cause may be read on the trial of another with these limitations: 1st. The parties must be the same or in privity. 2d. The question in controversy must be the same. 3d. It must appear that the testimony, if different, would have been prejudicial to the party introducing it. 4th. That the verdict and judgment rendered in one case would be evidence in the other. 1 Stark. Ev. 253; 2 How. R. 716. If the bill of exceptions show anything, it shows that this deposition possessed at least two of the essential requisites to its admissibility, viz.: the legal existence of the suit in which it was taken, and the identity of the parties in both suits.

It is not even suggested that the deposition wanted the other essentials. We must presume that it was presented in the court below, possessing all the qualities necessary to its admission, or that it would have been rejected, and that presumption is perfectly consistent with everything to be found in the record.

The court will observe, moreover, that it does not appear when the second exception mentioned in the first bill was taken. It cannot therefore be of any avail. *Wilson* v. *Owens*, 1 How. R. 126; *Phillips* v. *Lane*, 4 How. R. 122.

It is impossible to consider of the objections to the record, as the judgment and proceedings alluded to are not embodied in either bill of exceptions. See *Rankin* v. *Halloway*, 3 S. & M. R. 621.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of debt upon the transcript of a judgment recovered in Alabama. The defendants pleaded, first, *nul tiel record*, and secondly, that the plaintiff had theretofore impleaded the defendants for the same cause, in an action of assumpsit, in the same court, upon the trial in which a judgment had been rendered in favor of said defendants.

Issues were taken upon these pleas, the first of which was de-

Digitized by Google

termined by the court, and the other by the jury; both in favor of the plaintiff.

Whatever the rights of the plaintiffs in error, the defendants in the court below, may have been, they are not set out in the record in such a way as to make them available.

There is first a bill of exceptions to the opinion of the court, in permitting the transcript of the record from Alabama to go to the jury; and yet the record is neither incorporated into the bill of exceptions, nor referred to in such manner as to identify it with the transcript which the clerk has sent up. The bill of exceptions in regard to the deposition, is subject to precisely the same remark. According to repeated decisions of this court, they cannot be noticed here. *Maulding* v. *Rigby*, 4 How.; *Carmichael* v. *Browder*, Ib. 433.

There is nothing which purports to be a copy of the proceedings in the suit, mentioned in the second plea.

The bill of exceptions to the opinion of the court in overruling the motion for a new trial, does not embody the evidence, or set forth anything upon which this court can act.

The judgment is therefore affirmed.

Digitized by Google

JESSE GODLEY et al. *vs.* DAVID S. GOODLOE.

If the holder of a promissory note be ignorant of the place where the indorser resides at the time of protest, and cannot ascertain it after diligent inquiry, notice of protest sent to the place where the note bears date, will be sufficient.

The question of due diligence in serving notice of protest, when it depends on the testimony of witnesses before a jury, must be submitted to the jury for their decision, under appropriate charges as to the law from the court; if the evidence be agreed on by the parties, the question of due diligence is then one purely of law for the decision of the court.

IN error from the circuit court of Madison county; Hon. John H. Rollins, judge.

Jesse Godley and others sued David S. Goodloe, as indorser on a note made by Keenan and Goodloe to him, and by him indorsed to the plaintiffs, the date of which was "Tuscumbia."

It is not deemed requisite to notice any more of the record than to state, that at the trial the plaintiffs, having proved by the notary that they had sent notice to Tuscumbia, with other proof, referring to their inquiry to ascertain where the indorser resided, asked the court to instruct the jury, that "if the holder of the note was ignorant of the place where the indorsers resided at the time of protest, and could not ascertain it after diligent inquiry, notice sent to the place where the note bears date, will be sufficient." The court below refused the instruction, when the plaintiffs embodied the whole case in a bill of exceptions; and the jury finding for the defendant, they prosecute this writ of error.

A. H. Handy, for plaintiffs in error.

The error assigned is, that the court below refused the instruction asked by the plaintiffs, and set forth in the bill of exceptions taken pending the trial.

Digitized by Google

This instruction is as well settled law as any doctrine of the commercial law. It is taken nearly verbatim from the decision of the supreme court of New York, in the case of *The Bank of Utica* v. *Davidson*, 5 Wend. 588, and cases there cited. But it is objected, that diligent inquiry is a conclusion of law, and that the facts should be stated which constitute this diligent inquiry, in order that the court and jury might determine whether they amounted to due diligence. But the court was called upon, and it was its province, to declare the legal principle governing the case to the jury — it was the province of the jury to determine whether the facts, as proved before them, constituted diligent inquiry. In *Hoopes and Bogart* v. *Newman*, 2 S. & M. 79, this court says, "the question resolves itself into one of diligence, which the jury must determine from the evidence."

Even then, if the court below thought that the statements of the notary public, in his answer to the first interrogatory, were not sufficient to prove diligent inquiry to his satisfaction, yet it was proper to declare the principles of law applicable to the case, leaving it to the jury to say whether the evidence showed diligence to their satisfaction.

J. B. Howlett, for defendant in error, contended, that what constituted due diligence was a question of law for the court, and cited the following authorities: 1 Peters, 583; 3 Wend. 78, 79; 1 Cowen, 408; Chitty on Bills, 487, and note p. (9th Am. from 8th Lond. ed.); 3 McCord's R. 394; 4 Wend. 398; 13 Johns. R. 432; 7 Lou. R. 7; 2 Carr. & Payne, 300; *Myers* v. *Oglesby*, 6 How. R. 51.

A. H. Handy, in reply.

The defendant's counsel relies mainly on the position that the question of diligence was one to be settled by the court. The cases cited, 1 Peters, 583, 3 Wend. 78, and 1 Cow. 408, show that this is correct where the facts and circumstances of the transaction are undoubted. But such a case rarely occurs; for although it may be agreed that certain acts were done, the manner in which they were performed, and the conclusions

Digitized by Google

properly deducible from the statements of witnesses in relation to these acts, are generally matters of controversy; thereby presenting the question not only of what the facts are, but of what are the just inferences from the facts as stated. It might be competent for the court to dispose of the case if it depended solely upon naked facts admitted, without reference to the circumstances and inferences alleged to pertain to the transaction. But when such inferences are relied on, as is generally the case, the question becomes a mixed one of law and fact, which must be determined by a jury. 3 Kent's Com. 105, and authorities there cited.

Per Curiam. This record presents but a single question. In order to charge the defendant as indorser of a promissory note, the plaintiff's counsel requested the court to charge the jury, that "if the holder of the note was ignorant of the place where the indorsers resided at the time of protest, and could not ascertain it after diligent inquiry, notice sent to the place where the note bears date will be sufficient;" which charge the court refused to give, and the plaintiff's counsel excepted.

That the charge requested is in strict accordance with law is beyond doubt. In case the residence of an indorser cannot be ascertained after diligent inquiry, notice may be dispensed with entirely; or the holder may send the notice to the place where the note bears date. This court has so decided on more occasions than one. *Walker* v. *Tunstall*, 3 How. 259; *Hoopes and Bogart* v. *Newman*, 2 S. & M. 71.

But it is contended, on the other side, that what shall be deemed due diligence, is a question of law, and that consequently the charge was properly refused. Some of the cases decide that where the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. 1 Peters, 583; 6 Metcalf, 290. On this same principle, other cases decide that what is sufficient notice to charge an indorser, is a mixed question of law and fact, the facts being for the jury to decide, and the law for the court. Doubtless where the facts are found by special verdict, or agreed on by the parties, or rest on

Digitized by Google

proof which the court may decide on, the question is one of law; but where it depends upon the testimony of witnesses given before the jury, it is proper to submit the whole question to them under appropriate charges on the law. So we held in the case of *Hoopes and Bogart* v. *Newman*. But in this instance the court cut off all inquiry, by refusing to charge either on the law or on the facts.

We do not think it necessary or proper to decide on the question of diligence as presented by the proof in the case. We only decide that the charge refused by the court contains an undeniable legal proposition, and should have been given. By refusing it, the court virtually held, that inability to ascertain the residence of an indorser, after diligent inquiry, will not excuse the want of notice.

The judgment must be reversed and the cause remanded.

Digitized by Google

SAMUEL LAUGHMAN et al. *vs.* NANCY THOMPSON et al., Administrator and Administratrix of Shem Thompson, deceased.

It is competent for the maker of a note given for lands bought at an administrator's sale, to show by the records of the proceedings of the probate court appertaining to the sale, that the sale was not made according to the directions of the statute; and thus establish a failure of consideration of the note.

A sale by order of the probate court, of the real estate of a decedent, must be made in strict compliance with the law, by issuing citation and advertising, or it will be void, and the records of the proceedings may be offered to show that the rules of law in those respects have not been strictly observed.

It must appear, from the records of the probate court in cases of the sale of lands by an administrator under its order, that legal notice has been given to the heirs at law, or a legal reason in excuse of the want of such notice, or both the order and the sale are void.

In the absence of the record of the proceedings of the probate court touching the sale of a decedent's realty, the action of that court will be presumed to have been correct; when the record, however, is produced, it must show affirmatively that everything necessary to give the court jurisdiction was performed.

IN error from the circuit court of Jefferson county; Hon. C. C. Cage, judge.

Shem Thompson brought his action of assumpsit to the June term, 1839, of the Jefferson circuit court, against Laughman, Hinds, and Farley, upon the following promissory note:

$4,380. *Fayette*, 8th Jan. 1838.

Twelve months after date, we or either of us promise to pay to Shem Thompson, administrator *de bonis non* of the estate of Hezekiah Harmon, deceased, the sum of forty-three hundred and eighty dollars for value received, negotiable and payable at the office of the Planters Bank in the town of Port Gibson.

(Signed) SAML. LAUGHMAN,
H. M. HINDS,
G. P. FARLEY.

Digitized by Google

The defendants appeared and pleaded the general issue and payment.

At the May term, 1841, of the court, the plaintiff's death was suggested, and at the May term, 1842, the suit was revived in the names of Nancy Thompson, administratrix, and Levi N. Thompson, administrator of the said Shem Thompson.

At the November term, 1842, the case was submitted to a jury; the plaintiffs, as appears from the bill of exceptions, offered in evidence the note sued on, and closed their testimony.

The defendants then proved, by the admission of the plaintiffs, that the note sued on was given by them to the plaintiffs' intestate, as administrator *de bonis non* of Hezekiah Harmon, deceased, to secure the first instalment of the purchase-money due by Laughman for a tract of land belonging to the heirs of said Harmon, and which had been sold by Thompson, the administrator *de bonis non* of Harmon, under an order of the probate court of Claiborne county, and purchased by Laughman at the sale.

The defendants then produced, and offered to read in evidence to the jury, two certified copies of the records of the probate court of Claiborne county, showing the following facts, to wit:

That on the 28th day of February, A. D. 1837, Shem Thompson, as administrator *de bonis non* of Hezekiah Harmon, filed his petition in that court, alleging that it would be to the interest of the heirs of Harmon, that all his real estate should be sold, and praying for citation to those interested, to come forward at a proper time, and show cause why an order of sale should not be made.

Upon this petition it was ordered by the court that publication be made and citation issued to all persons interested in the lands, &c. of the said Harmon, deceased, to come forward at the April term, 1837, of said court, and show cause, &c. why an order should not be granted for the sale of said real estate.

At the April term, 1837, of said court, and on the 24th day of April, an order was made reciting that upon the application of Shem Thompson, administrator of Hezekiah Harmon, de-

Digitized by Google

ceased, for permission to sell certain land belonging to said estate, the court being satisfied, from proofs, that it would be to the interest of the heirs and others interested, that the lands should be sold; and it being proved to the satisfaction of the court that an advertisement containing notice of the application had been inserted in two of the most public newspapers printed within the state of Mississippi for six successive weeks, (in which advertisement the land subsequently purchased by Laughman, and for which the note sued on was given, is described as "a tract containing 240 arpents, situated in Jefferson county, on the waters of Colis creek, confirmed to the legal representatives of Christian Braxton by the board of commissioners 13th May, 1805,") and the said Shem Thompson having entered into bond with security conditioned according to law, it is ordered by the court that Shem Thompson, administrator as aforesaid, sell each of the tracts mentioned in said advertisement as the property of said Harmon's estate, on his giving two months' notice thereof in two public newspapers printed in the state, upon a credit of one and two years from the day of sale, the purchaser giving notes with approved security, payable in bank, for the payment of the purchase-money.

At the May term, 1838, of said court, Thompson returned to the court his account of sales of the real estate of Hezekiah Harmon, deceased, showing that they were sold by him on the 8th January, 1838, and that Samuel Laughman purchased 240 arpents in Jefferson county, at $36 50 per arpent — $8,760; which was ordered to be received and recorded.

To the reading of which records in evidence to the jury, the plaintiffs objected, which objection was sustained by the court, and the records ruled out, and neither of them suffered to be read to the jury.

To the ruling out of this testimony, the defendants excepted, and presented their bill of exceptions, which was signed, &c. before the jury retired.

A verdict was ordered for the plaintiffs. Whereupon the defendants moved the court for a new trial:

Digitized by Google

1. Because the court rejected legal evidence offered by the defendants on the trial, and would not permit the same to go to the jury. 2. Because the verdict of the jury is contrary to law and evidence.

Which motion was overruled. To which opinion of the court overruling said motion, the defendants excepted, and embodied in their bill of exceptions the whole of the testimony given in the cause, and which was all embraced in the bill of exceptions signed by the court previous to the retirement of the jury.

The defendants have brought the case up to this court by writ of error.

Coleman, for plaintiff in error.

1. It was error in the court below to permit the suit to be revived in the name of the personal representatives of Shem Thompson. How. & Hutch. 397, § 40; *Colt* v. *Larnin*, 9 Cowen, 320; *Dale* v. *Roosenvelt*, 8 Cowen, 333; 1 Bos. & Pul. 310; Bro. Abr. tit. Administrators; 7 Com. Dig. Administrator, B. 6; 1 Williams on Ex'rs. 133; 1 Salk. 207; Toller on Ex. 162, 407; 11 Viner's Abr. 97; Moore, 462; 13 Lutw. 342; 7 Har. & Johns. 40.

2. The note sued on was void, and no judgment could legally be rendered upon it. It was made payable at the office of the Planters Bank in Port Gibson. Administrators are expressly prohibited from taking notes payable in bank. How. & Hutch. 114, sec. 94. A contract made against the prohibition of a statute is wholly void. 1 Ventr. 237; Cro. Eliz. 199; 3 Taunt. 244; 4 Maule & Sel. 66; 17 Mass. R. 281; Chitty on Cont. 229, 232.

3. The records of the probate court were improperly ruled out by the court below. They were rejected on the ground that there was no evidence that Laughman had ever been evicted. In *Puckett* v. *M'Donald*, 6 How. 269, the court say, in answer to a similar objection, "No eviction is necessary, since the paramount title of the heirs is as effectually established by the evidence, as it could be by the record of eviction." Such

Digitized by Google

will be found to be the effect of the evidence in the case furnished by the records; they show,

1st. That Thompson filed his petition for the sale of the land on the 28th of February, 1837, and that the order of sale was granted on the 24th of April, 1837.

The statute requires that the citation shall be returnable "not less than sixty days after the time of issuing such citation." How. & Hutch. 418, sec. 113.

The order recites that citation was ordered at the time of the filing of the petition, i. e. on the 28th of February. From the 28th of February to the 24th of April was only fifty-five days, which, supposing the citation to have been issued on the very day it was ordered, (of which, or of its having issued at all, there is no evidence,) falls short five days of the notice required by the statute.

The order of sale then was a nullity, from the want of power in the probate court to make it. The sale itself being made without authority, was void, and passed no title to the purchaser, who is a mere trespasser upon the land. And the note given by him for the purchase-money being wholly without consideration, is also void. This position is so fully sustained by the repeated adjudications of this court, that it is only necessary to cite them in its support. *Edmondson* v. *Roberts*, 2 How. 822; *Campbell* v. *Brown*, 6 How. 106; *Puckett* v. *M'Donald*, 6 How. 269; *Gwin* v. *M'Carroll*, 1 S. & M. 351; *Smith* v. *Denson*, 2 S. & M. 326; *Weston* v. *Howard*, 2 S. & M. 527.

2d. That the order of the probate court was void, because it required the administrator to take from the purchasers notes payable in bank, in violation of the statute. How. & Hutch. 414, sec. 94.

3d. The record nowhere shows that citation ever issued; that citation was returned executed; or any excuse for the failure, by any evidence, or even allegation that the parties interested resided out of the state.

"The existence of the facts which give the probate court power to decree a sale of lands must appear affirmatively upon

Digitized by Google

the record of its proceedings." *Campbell* v. *Brown*, 6 How. 230.

The issuance of citation, and its return executed, or a showing of the non-residence of the parties interested, were necessary to give the court power to order the sale. Nothing is shown but that citation was ordered to issue.

In addition and conclusion, we refer upon this point, also, to the cases already cited from 2 and 6 How. and 1 and 2 S. & M. as conclusive of the entire invalidity of the sale.

Clark, on same side.

The note sued on in this case was given to Shem Thompson, as administrator of the estate of Hezekiah Harmon, for land purchased of said Thompson, as such administrator.

The money secured to be paid by this note, becomes assets of Harmon's estate, and would go to the administrator *de bonis non*. 2 Hay. 60; Ib. 18; Toller on Executors, 162; 1 Barn. & Cress. 150. In such case the right belongs to the administrator *de bonis non*, and he must bring the suit. 1 Saund. Pl. & Ev. 607; 1 Barn. & Cress. 150. If judgment had been rendered in this case before the death of Shem Thompson, the administrator, and had not been satisfied, the judgment would have been nugatory, and the administrator *de bonis non* of Harmon's estate could have brought a new action upon the note. *Gout, Administrator*, v. *Chamberlain*, 4 Mass. R. 611, and cases there cited; Ibid. 413. It being admitted, in the trial by the plaintiff below, that this note was assets of the estate of Harmon, and not of the estate of Thompson, it must abate, and a new action be brought by the representatives of Harmon. The court therefore erred in permitting the revival of this case in the name of Thompson's administrators, and rendering judgment in their favor.

The court also erred in ruling out the records of the probate court of Claiborne county, of the proceedings in regard to the sale of the lands by the administrator of Harmon, for which lands this note was given:

1. Because the said records show that the court ordered the

Digitized by Google

administrator to require of the purchasers notes payable in bank, contrary to the statute, (H. & H. 414,) which forbids administrators to require such notes, and the act of 1830, which requires that bonds shall be taken.

2. Because the said records show that the order of the probate court, granting power to the administrator to sell, was void. The application to the court, by petition, was made on the 28th February, and the final order of sale was made on the 24th April following, fifty-four days only intervening. It was the duty of the court to have ordered citations to issue, returnable "not less than sixty days after the time of issuing such citation," directed to the heirs, &c., (H. & H. 418,) and the administrator is required to give notice, by advertisement, to all persons interested, to appear at the court "at which such citation is made returnable." No such citation issued in this case, and none could have issued. The same statute requires that if the parties interested reside in the state, that the citation shall be served upon them, "executed." And the subsequent statute of 1833, (H. & H. 420, sec. 119,) requires publication for three months, in case the parties reside out of the state.

The petition and notice do not specify the lands, as required by the statute.

The court below ruled out these records, because it was not shown by defendants that the purchaser had been evicted. In the cases in 6 Howard, of *Campbell* v. *Brown*, and *Puckett* v. *M'Donald*, this court has settled the doctrine upon this point, and according to these cases the purchaser is a mere trespasser against the heirs, and the notes sued upon absolutely void, for want of consideration.

The court therefore erred in refusing to grant a new trial.

Thrasher and *Sillers*, for defendants in error.

If there were any objections to the form of the pleadings, they were all waived and cured by the pleas of non assumpsit and payment. This court has adjudicated upon a similar case. 2 How. 851. The suit having been brought correctly, it would seem to follow that it was correct to revive it in the name of

Digitized by Google

plaintiff's administrators, after his death. Rev. Code, 40, sec. 41; Ibid. 64, sec. 119. At all events, we submit that, if the suit was right before plaintiff's death, the appellants should have objected to the revival.

But we contend that the objection to the validity of the proceedings in the probate court, amounts to nothing. If the probate court did anything that the statute requires, the sale is good. If it did more, the excess will not vitiate what was correctly done, and the purchaser could demand a deed from the administrator, by tendering a note, with good security, and could have forced the sale reported and confirmed. The objection is made under the act of 1821. Rev. Code, 64, sec. 118. The order of sale was made under the act of 1830. H. & H. 418, sec. 113. The order of sale directs the administrator to take a note payable in bank, (not in any of the banks of this state.) The act of 1821 says that no executor or administrator shall require a note payable in bank. (Nothing said about the order of the court.) But the proceedings in the probate court took place under the act of 1830, which provides that the court may order the sale on such terms and credits as they shall deem most advisable, provided only that it shall not be made on a shorter credit than twelve months. The probate court deemed it advisable to require notes of the purchaser payable in any bank, one and two years after date; and those were the terms and credits upon which the sale was made. If that order of the probate court be not absolutely void, the objection cannot be made in this collateral way. If it was illegal and void, the appellants ought not to have made the note in that form. They made it voluntarily, and without objection. There is no evidence that the administrator required it in that form, or that appellants objected to it, or that the land sold under its value. The high price which it brought is evidently the reason of this defence.

As to the citation and publication. It does not appear that at any time there were any heirs or creditors of Harmon residing in this state, or elsewhere. If there were none, or if they voluntarily appeared in court, then no citation was neces-

Digitized by Google

sary, and publication alone was sufficient. Publication was made for six weeks, as required. It does not appear whether citation was issued and served or not, nor whether the parties voluntarily appeared. The record therefore fully makes out a case authorizing an order of sale, as against non-resident parties; and if the court was satisfied by evidence that there were no parties to the proceeding, residing in this state, then no citation was necessary, and the court acted rightly in ordering a sale upon proof of publication. We are bound to presume everything that the law allows, in order to sustain, if possible, the action of the probate court, and therefore we are bound to presume, either that there were no parties to the proceeding, resident in this state, and that the court had evidence of the fact, or that such parties voluntarily appeared in court. The appellants did not plead that there were such resident parties, nor did they offer to prove it under the pleas filed; and it is very strange they did not, if the facts existed; and we conclude that the inevitable presumption is, that there were none. If the court presumes there were, they ought at the same time to presume that the probate court had before it all that was necessary to justify the order.

Again, it is urged that the order of sale was made only fifty-four days after the order for citation and publication, and therefore void. The act of 1830 requires the administrator to advertise in two newspapers for six weeks. This was done. If there were no resident parties no citation was necessary, and six weeks' publication was sufficient, and it was unnecessary to wait until the expiration of sixty days. But we insist that this evidence was inadmissible under the pleas. If the appellants wished to make this point in their defence, they should have filed a special plea to the effect. Non assumpsit and payment waive the objection. There is no failure of consideration. Precisely the same consideration exists now that existed when the note was made. The purchaser has never been evicted from the possession of the property. He is still in possession. No one has attempted to interfere with him. He has never even tendered it back to the estate of Harmon. The defence is a most graceless one.

Digitized by Google

In the case of *Campbell* v. *Brown*, 6 How. the defence was made the subject of a special plea, preceded by non assumpsit. There was a demurrer to the special plea, which admitted it, and this court overruled the demurrer. If it had been competent to give the substance of the special plea in evidence, under the plea of non assumpsit, the court would have sustained the demurrer, because the special plea amounted to the general issue.

Mr. Justice THACHER delivered the opinion of the court.

Shem Thompson instituted his action of assumpsit, in his individual capacity, upon a promissory note, dated in 1838, and payable to him as administrator *de bonis non* of the estate of Hezekiah Harmon, deceased. The defendants below pleaded non assumpsit, and a plea of payment. Some time after the institution of the suit, the death of the plaintiff was suggested to the court below, and the cause was revived in the names of the plaintiff's administratrix and administrator, without objection on the part of the defendants there. The cause was submitted to a jury, who rendered a verdict for the plaintiff's administrators, and a judgment was given in accordance therewith. The record shows that during the trial, the defendants below filed a bill of exceptions, by which it appears that the plaintiff below read the note upon which the action was founded, in evidence, and also admitted that the note was made by the defendants below, to the original plaintiff, as administrator *de bonis non* of Hezekiah Harmon, deceased, to secure the payment of an instalment of the purchase-money due by Laughman, one of the defendants below, for a tract of land belonging to the estate of Harmon, and which had been sold by Shem Thompson, as administrator *de bonis non* of Harmon, by virtue of an order of the probate court of Claiborne county, and purchased by Laughman at said sale; that the defendants below then offered to introduce in evidence two certified copies of the records of the probate court of Claiborne county, in order to show that the proceedings of that probate court, under which the land had been sold, and for which the note sued upon had

Digitized by Google

been given, were irregular, and contrary to law, and that the note was therefore void, because the records show that a citation to the heirs had not been duly issued and served, and publication had not been made according to law, and because the note in question was improperly made payable in bank. The introduction of these records, as evidence, was refused by the court below. The record also shows that a motion for a new trial was made and overruled, and the bill of exceptions thereunto sets out the evidence as above stated.

It is certainly competent, in a case where the objection to the recovery upon a promissory note is put upon the grounds that the consideration for which the note was given was property purchased at an administrator's sale, and that the sale was not made according to the directions of the statute, in such cases, to permit the records of the proceedings of the probate court, appertaining to the sale, to be introduced in evidence, and it is error to reject evidence thus legitimate. *Worten, Administrator*, v. *Howard*, 2 S. & M. 530. A sale by order of the probate court of the real estate of a decedent, must be made in strict compliance with the law, by issuing citation, and advertising, or it will be void, and the records of the proceedings may be offered to show that the rules of law in those respects have not been strictly observed. *Smith* v. *Deuson, Adm'r.* 2 S. & M. 326. It must appear from the records of the probate court, in cases of the sale of lands by an administrator under its order, that legal notice has been given to the heirs at law, or a legal reason in excuse of the want of such notice, or both the order and the sale are void. *Gwin et al.* v. *McCarroll*, 1 S. & M. 351; *Campbell* v. *Brown et ux.* 6 How. 106. In the case at bar, the record offered to be introduced does not show whether citation was issued and served, or not, nor whether there were any heirs or creditors of the estate, or whether they voluntarily appeared. In the absence of the record, this court would be bound to presume that the probate court acted correctly; but if, upon inspection of the record, no citation appears to have issued, no appearance to have been made by the parties, and no evidence of the non-existence of such parties, this court

Digitized by Google

would be compelled to pronounce an order and sale, under such circumstances, to be void. Such a record must show, affirmatively, everything necessary to give the court jurisdiction over the subject-matter. The defence sought to be introduced in this case was decided by this court in the case of *Gwin et al.* v. *McCarroll*, above quoted, to be legitimate under the general issue.

The point taken upon the mode in which the suit was instituted, and afterwards revived, we do not think is well sustained. *Buffum* v. *Chadwick*, 8 Mass. R. 103.

Judgment reversed, and new trial awarded.

Digitized by Google

GREEN J. WOOTEN *vs.* DAVID R. WINGATE, Administrator of Jourdan Morgan, deceased.

It is error for the circuit court, after several pleas have been filed, two verdicts rendered, and new trials granted, on motion to set aside the service of the writ in the case, and give a final judgment for the defendant.

Where the bill of exceptions, taken by the plaintiff to an order of the court, setting aside the service of the writ, after pleas were filed rendering a final judgment for the defendant, recites that the order thus excepted to was made on the motion of the plaintiff, while the judgment of the court itself states that it was made on motion of the defendant, the high court of errors and appeals will adopt the construction, that the order was made on motion of the defendant, as the most sensible and consistent with the whole record.

Where the record is itself contradictory in its parts, that construction must, if practicable, be adopted which will make it sensible and consistent, not one which is wholly absurd, and will preclude relief.

IN error from the circuit court of Marion county; Hon. Thomas A. Willis, judge.

Green J. Wooten, on the 2d day of September, 1841, filed his declaration in *assumpsit* against David R. Wingate, administrator, &c. of Jourdan Morgan, deceased; a writ of *capias* issued, and was returned with the following indorsement of service: "Executed on the defendant, Wingate, by posting up a copy of the original, on the door at the house of his residence, September 16th, 1841." The defendant appeared at the return term of the writ, and plead *non assumpsit;* afterwards the plaintiff's declaration being amended by permission, the defendant plead the further plea of *non assumpsit* by his intestate; payment by his intestate, with an account of set-off, and payment by the administrator since Morgan's death. Replications were filed and issues taken. At the October term, 1842, a mistrial took place, when a juror was withdrawn, and the cause retried at the same term, when the jury found a verdict in favor of the plaintiff for six thousand dollars. The defendant filed

Digitized by Google

three bills of exception at this trial, and moved for a new trial; which was granted.

At the April term, 1843, the cause was again tried, and the jury found for the plaintiff again for $6510 15. At this trial, eight bills of exception were sealed. A motion for a new trial was made, taken under advisement by the judge, and granted in vacation.

In September, 1843, on the affidavit of Wingate, that he could not obtain an impartial trial in Marion county, the *venue* was changed to Covington county.

At the November term, 1843, of that county, the plaintiff, on leave, filed an amended declaration; after stating which fact, the record recites as follows, viz.: "Thereupon, on motion of the said defendant, the service of the writ of *capias ad respondendum* in this case is set aside. It is therefore considered by the court, that said defendant go hence without day, and recover of the said plaintiff his costs by him about his defence in that behalf expended, for which execution may issue." The bill of exceptions following this entry was in these words, viz:

"Be it remembered, that on the first day of the term aforesaid, the said plaintiff, by his attorney, moved the said court for leave to file an amended declaration in said cause, which motion was granted upon the payment of all the costs accrued in said cause, from the granting of the change of venue up to the present time; and thereupon, the counsel of the plaintiff made the following motion, to wit: 'Motion in this cause to set aside the return of the service of the *capias*, because the same is informal and contrary to law;' which motion the said court allowed, and the service of said writ was by said court set aside, to which opinion and judgment of the court, the plaintiff, by his counsel, excepts and prays that this his bill of exceptions may be signed, sealed, and made a part of the record in the case, which is accordingly done, Nov. 28, 1843.'

THCS. A. WILLIS." [L. S.]

The plaintiff prosecutes this writ of error.

Digitized by Google

W. P. Harris, for plaintiff in error.

The only point in this cause which the court can consider is the one presented in this bill of exceptions. The new trial granted after the first verdict waived all the exceptions upon the trial, and so also of the second. That point is the propriety of the court sustaining this motion at the stage of the case it did. Twice had appellee appeared and plead; and upon a third trial, he was allowed to come forward and take exceptions to the process. This was manifest error, only needing to be stated to strike the mind of the court. The question is not as to the legality of the service of the writ; but the defendant had twice appeared and plead, and upon long-settled practice this was a complete waiver of every objection to the process, however defective. 4 How. 27, where C. J. Sharkey decides an appearance by a plea which is a nullity even, waives all defects of service of process. In fact, a writ is a mere notice to a party; and when a party appears either voluntarily or under this notice, and answers, the object of the law is obtained; its jurisdiction is fixed, and the party must abide the result upon the merits of the case alone.

It may be contended that this bill of exceptions shows that the plaintiff made this motion to quash the writ. The court will not regard this objection; 1, because the plaintiff could not move to quash his own writ, he could only ask leave to amend it; 2, because it is evidently a simple clerical mistake in drawing the bill of exceptions; 3, because the motion itself, and the judgment thereon, show it to have been the motion of defendant; 4, because the bill of exceptions shows affirmatively, that the plaintiff excepts to the opinion sustaining the motion, which would be absurd had it been his own motion.

Montgomery and *Boyd*, for defendant in error.

This is a singular case, and very difficult to understand. Notwithstanding the long record, we conceive there can be but one point raised, and that is as to the regularity of the dismissal of the suit, or the judgment in favor of the defendant.

It is not an easy matter to understand the records of many of

Digitized by Google

our courts, but of all we have had the misfortune to examine, this is the most difficult to understand. It is not necessary to go further back than the last bill of exceptions, which evidently was intended to contain something more, but what that something might happen to be, we are at a loss to discover.

The recitals of the bill of exceptions that the plaintiff moved to set aside, the return on the *capias* might be regarded as a clerical error, if it were not for the equally ridiculous recital that the plaintiff had asked for, and obtained leave to amend his declaration. And can you tell with certainty whether that act of the court is not also excepted to?

The judgment is merely informal, not erroneous; the defendant should have moved for a nonsuit, unless the plaintiff moved for an *alias capias*. The defendant was not bound to appear to a new declaration in the cause, and an alias could not issue because the case had been removed from the county of defendant's residence. All these blunders having been committed by the plaintiff, he ought to be ashamed to ask this court to rectify them. But we apprehend no case can be found, in which a court has interposed to correct errors at the instance of the party who caused them. The plaintiff should have employed counsel learned in the law, as specified in the constitution.

Mr. Justice CLAYTON delivered the opinion of the court.

There is but a single point for decision in this cause. After several pleas had been filed, and after two verdicts and new trials, the court upon motion set aside the service of the writ in the case, and gave a final judgment for the defendant. This was palpably erroneous. It is said here, however, that the error cannot be corrected in this court, because from the bill of exceptions, it appears that the order was made at the instance of the plaintiff himself. The bill of exceptions does so state the fact; but the judgment of the court states that it was done on motion of the defendant.

Where the record is itself contradictory in its parts, we must, for the furtherance of justice, adopt that construction if practicable, which will make it sensible and consistent; not one

Digitized by Google

which is wholly absurd, and which would preclude relief. It is difficult to believe, that the plaintiff in one instant moved to have himself turned out of court, and in the next excepted to the action of the court in doing it. If he desired to go out, the door was always open for a nonsuit.

The judgment will therefore be reversed, and the cause remanded for farther proceedings.

Digitized by Google

CHARLES SPEAR et al. *vs.* REUBEN KING.

Upon motion to dismiss an attachment, the court cannot look beyond the face of the bond itself; if it be valid upon its face, that is sufficient.

If an attachment bond be signed by A., as agent for the attaching creditor, and be in other respects regular, the court cannot, on motion to dismiss the attachment, inquire into the question as to the agency of A.

An affidavit to procure an attachment, which avers that the debtor is concealing his goods, will not be vitiated by containing the reason of the creditor's belief of that fact.

An affidavit to procure an attachment in these words, viz.: "Said K. (the debtor) has conveyed to his brother most of his tangible effects, is greatly in debt for goods purchased as a merchant; and these debts are pressing him; that these goods K. had conveyed to his brother, who was a man of little property or responsibility, but lately come to this state; no permanent residence in it, and is expected soon to leave; that some of said goods had been boxed up, and that K. and his brother contemplated moving themselves out of this state in some short time, and that by this means K. was concealing his effects so that the claim of the creditor would be defeated in the ordinary course of law:" *Held*, to be sufficient.

IN error from the Lowndes circuit court; Hon. Hendley S. Bennett, judge.

John S. Topp, Esq., made the following affidavit before a justice of the peace in Lowndes county, viz.: "That according to the best of his knowledge and belief, Rueben King, of said county, is indebted to Alva Spear, Charles Spear, and Edward Vanderhoof, merchants and partners under the firm of Spear & Vanderhoof, in the sum of eight hundred sixty-nine dollars and eighteen cents, by promissory note dated May 1st, A. D. 1844, due eleven months after date, and payable to the order of said Spear & Vanderhoof; that said Spear & Vanderhoof are absent from this state, and said affiant is their attorney for the collection of said debt; affiant further states that he is informed that said Reuben King has conveyed to his brother, Charles B. King,

Digitized by Google

most of his tangible effects; that said Reuben is greatly indebted for goods, wares, and merchandise, by him purchased as a merchant; that the debts of the said Reuben are now beginning to be pressed upon him; that said goods, wares and merchandise said Reuben has conveyed to, and put in the possession of said Charles B. King, who is a man of but little property or responsibility, who has but lately come to the state of Mississippi, and has no permanent residence in the same, and is expected soon to leave the state; that some of said goods, wares and merchandise have been boxed up, and that said Reuben and said Charles B. contemplated removing themselves out of this state in some short time; affiant further saith, he believes the facts above stated are true, and that said Reuben is by the means above stated, concealing his effects so that the claims aforesaid will be defeated at the ordinary course of law."

At the same time the magistrate received a bond, commencing in this way, viz.: "Know all men by these presents, that we, Alva Spear and Charles Spear and Edward A. Vanderhoof, John S. Topp and Richard Evans are held &c.;" the body and conditions of the bond were in the ordinary form; its signatures and seals as follow, viz.:

ALVA SPEAR. [L. S.]
By his agent and Attorney, John S. Topp.
CHARLES SPEAR. [L. S.]
By his agent and Attorney, John S. Topp.
EDWARD A. VANDERHOOF. [L. S.]
By his agent and Attorney, John S. Topp.
JOHN S. TOPP. [L. S.]
R. EVANS. [L. S.]

A writ issued in the ordinary form, but did not embrace all the recitals of the affidavit, and was levied on the goods belonging to Reuben King. At the return term, the defendant, King, by counsel moved the court to quash the attachment. 1. For want of an affidavit. 2. For want of a sufficient bond. 3. Because the writ did not pursue the affidavit and bond. At the

Digitized by Google

hearing of the motion, a rule was asked for against Topp, to compel him to show by what authority he sealed the bond for the plaintiffs in the attachment; upon which Topp admitted that he had no power or authority under seal, to sign, seal and deliver the bond; but that he was employed by plaintiffs in writing by letter as an attorney at law, to prosecute said suit; and that he was an attorney of that court.

The court dismissed the attachment, from which the plaintiffs therein appealed.

Evans, for appellant.

Is an employment by letter sufficient to authorize an attorney at law to prosecute the suit of attachment? Is it sufficient to constitute an agent to prosecute the suit? Or is it necessary to make use of a sealed instrument for that purpose? We presume that this question admits of but one answer, viz.: that the attorney may be employed, or the agent appointed without the solemnity of an instrument under seal.

The attorney or agent being duly appointed to prosecute the suit, derives his power to make the affidavit and execute the bond for the principal, from the statute. His authority to prosecute comes from the plaintiff; his authority to execute the bond comes from the statute. All agents appointed to prosecute a suit by attachment are so appointed with direct reference to the law clothing him with power to execute the bond. Hence an agent to prosecute, can execute the bond, though his agency be not created under seal, because the statute gives him the power so to do. To this it may be said that the statute only confers on the agent the power to bind himself individually. The answer is, that such a construction is a perversion of the statute, and of all law on the subject of agency. The act of the agent binds the principal. If the principal be not bound, the act is not the act of his agent, and hence if the agent, to prosecute cannot bind his principal by the bond, then he cannot do that which the statute expressly gives him power to do.

The statute did not intend that the agent should bind himself at all events. If so no one could appoint another to prosecute

Digitized by Google

the suit except one who is willing to become surety. That the agent must necessarily bind himself by acts done for the principal, or about the business of the principal, is counter to all law on the subject of principal and agent.

Again, John S. Topp was an attorney at law, an officer of the court, and as such, authorized to prosecute suits of attachment. He was employed with reference to his authority to prosecute the suit, and consequently he had power to do all such acts as were necessary to be done about the prosecution of the suit. Paley on Agency, 170 sec. 4; Ib. 159 sec. 1.

In *Wallis* v. *Wallis*, 6 How. R. 256, the high court of errors and appeals of Mississippi declare — "It surely cannot be denied that one partner can bind his firm by deed in all matters which concern the prosecution of suits in which they are concerned. The bond is obligatory on the firm as much so as if it had been signed by the several members composing it. The law makes D. Wallis the agent for the other partners in all matters coming necessarily within the scope of the partnership." If the bond signed by one partner is binding on the others, though the names of the others were not signed thereto, surely it would have bound them equally had their names been signed thereto by the agent, D. Wallis.

Apply the doctrine to the present case. Topp was agent of the plaintiffs to prosecute the suit by appointment, as D. Wallis was agent of the other parties by operation of law. The attachment bond was necessary in the prosecution of the suit. And hence Topp could bind his principals by the bond without signing their names thereto, and surely he bound them equally though he signed their names.

The court in the above case from Howard, proceeds to say that "the bond imposes no new obligation upon the principals. They are already bound by the judgment, and would be equally bound for the judgment in the appellate court. The object of the bond is to increase the security of the opposite party, which is done by requiring the secretaries to subscribe it. These views have been sanctioned by the supreme court in Alabama, in *Roden* v. *Roland*, 1 Stewart R. 266; and in Kentucky, Hardin's R.

Digitized by Google

149, 172. The reason of these cases applies equally to attachment bonds."

Hence it is a matter of no moment whether the names of the principals are to the bond or not. They are bound in either case. It shows an extreme love for technicality to quash an attachment because the names of the principals were put to the bond by the agent, when they would have been bound if he had not put their names there.

There is no objection to the sureties, and it is submitted whether the court below did not err in quashing the suit.

Topp being the agent, and having given bond and security, brings the case within *Page* v. *Ford*, 2 S. & M. 266; and several cases on the same point in S. & M. and 7 How.

"A bond executed by an agent of the plaintiff in an attachment, binding himself individually, is a sufficient statutory bond to uphold the attachment." 2 S. & M.

Harris and *Harrison*, and *A. Y. Smith*, for appellee.

Two motions were made in the court below. One for a rule for the plaintiff's attorney to produce the power or warrant of attorney of the agent who signed the principal's name to the bond, and the other to quash the proceedings because the affidavit was insufficient, the bond was insufficient, and the writ was insufficient.

The bond purports to be the bond of the plaintiffs, as principals, by John S. Topp, agent and attorney. It does not assume to be the individual bond of the agent, but he undertakes to bind his principals.

The defendant, upon entering his appearance, had a right to the rule. *Lindner* v. *Aaron & Nelson*, 5 How. R. 586; 1 Hill's S. Car. R. 268.

Upon the trial of the motion, plaintiff's attorney admitted that he had no authority under seal.

"The agent cannot bind his principal by deed, without an authority by deed also." *Lindner* v. *Aaron et al.* 5 How. R. 586; *Williams* v. *Crutcher*, Ib. 76. Story on Agency, 237, sec. 242; Ib. 50, sec. 49; 3 Kent, 613; 1 Wend. 424; 2 Mass. 11.

Digitized by Google

Even a ratification must be under seal. Story on Agency, 237, sec. 242; 9 Wend. 54, 58; 12 Wend. 525.

"The bond must be perfected before the attachment can issue." *Parminter* v. *McDaniel et al.* 1 Hill's S. Car. R. 268.

"A bond may be executed by an agent binding himself individually and not professing to bind the principal." *Frost* v. *Cook*, 7 How. 357.

But if he undertakes to bind his principal, and make it the deed of the party himself, he must have the necessary legal authority to do so.

The statute confers no such authority upon the agent, and makes no exception to the general rule of law, when he undertakes to seal and deliver the bond as the act of the principal.

But it is contended that "John S. Topp was an attorney at law, and an officer of the court, and as such was authorized to prosecute suits of attachment, and consequently that he had the power to do all such acts as were necessary to be done about the prosecution of the suit." The statute makes no such distinction, and puts the agent and *attorney* precisely on the same footing. H. & H. Dig. 549, sec. 13. Upon general principles no such authority as that of sealing and delivering bonds is conferred upon an attorney at law, by virtue of his being employed in a suit.

The case of *Wallis* v. *Wallis*, 6 How. 256, cited on the other side, has no application. There the bond was signed, sealed and delivered by one of several co-partners. The court say "one *partner* can bind his firm by deed in all matters which concern the prosecution of suits in which they are concerned."

"The law makes D. Wallis the agent for the other partners in all matters coming necessarily within the scope of the co-partnership." Ib.

The law having made him the agent, his signature affixed to the bond binds him and the other parties, &c. Ib.

The act of one partner is the act of all. But surely there can be no analogy between such a case and that of an attorney at law, who does not bind himself as principal at all, but who seeks to execute a bond as the agent of third persons.

Digitized by Google

The counsel of plaintiffs is mistaken in supposing that nothing, except the want of authority to sign the bond, will be insisted upon. It was contended in the court below that the affidavit upon which the attachment was predicated was insufficient.

The statute provides that affirmation must be made, "that the debtor is about to remove out of this state, or has so removed, or is about to remove, or has concealed, or is concealing, or removing, or about removing, his effects, so that the claim of the attaching creditor will be defeated, or cannot be made;" and the facts upon which the application is predicated shall be stated in the affidavit to be within the personal knowledge of the applicant, or that he is informed and believes the facts stated to be true. Acts of 1844, 125, 126.

In the affidavit the facts upon which the attachment was predicated are set out at large. The statute does not compel this to be done. But they are voluntarily disclosed, and the plaintiffs must stand or fall by them. The act only requires that the statement be contained in the affidavit, that the facts upon which the application is predicated, are within the personal knowledge of the applicant, or that he is informed, or believes the facts to be true. Plaintiff's counsel go farther, and assert that they were bound to set out the facts. But to the facts disclosed we object. They are as follows, viz.: "That affiant is informed that said Reuben King has conveyed to his brother Charles most of his tangible effects; that said Reuben is greatly indebted for goods, wares, and merchandise, by him purchased as a merchant; that the debts of said Reuben are now beginning to be pressed upon him; that said goods, wares, and merchandise, said Reuben has conveyed to, and put in the possession of said Charles, who is a man of but little property or responsibility, who has but lately come to the state of Mississippi, and has no permanent residence in the same, and is expected soon to leave the state; that some of said goods, wares, and merchandise, have been boxed up, and that said Reuben, and the said Charles, contemplated removing themselves out of the state in some short time, and that he, affiant,

Digitized by Google

believes the facts above-stated, to be true, and that the said Reuben, by the means above-stated, is concealing his effects, so that the claims aforesaid will be defeated at the ordinary course of law."

That this affidavit is double, it will require no argument to prove. That it is argumentative, is clear; that it is not positive, is manifest; that it enlarges the cause of action, is evident. The statute is, "that the claim of the attaching creditor will be defeated, or cannot be made." The affidavit is, that the claims aforesaid, (alluding to sundry debts, for goods, &c., belonging to others, for only one is sued on,) will be defeated "at the ordinary course of law." There is no allegation that the defendant is concealing his effects, but, merely "by the means aforesaid." But the affidavit disproves the inference attempted to be drawn from the facts. There is no allegation of a fraudulent conveyance, yet it is stated that Reuben had conveyed to, and put into the possession of his brother, goods, wares, and merchandise, and that his brother is expected soon to leave the state, and that some of the goods are boxed up. It is nowhere stated that the goods and effects were conveyed without consideration; but the affidavit alleges the sale and delivery. Nor, is there one single fact stated that justifies the inference that King was concealing his effects.

The affidavit states that both the Kings contemplated removing out of this state. This is a distinct ground, under the statute, and the attachment is accordingly defective.

The writ is also insufficient, in not pursuing the affidavit. The only statement is, that Reuben King "is concealing his effects, so that the said debt will be defeated." This writ recites the affidavit.

Mr. Justice CLAYTON delivered the opinion of the court.

Two questions are presented by this record. The first is as to the sufficiency of the bond given for the attachment issued in this cause; the other in regard to the sufficiency of the affidavit.

Digitized by Google

The bond was executed in the name of the principals, by the attorney who sued out the attachment, and who had no authority under seal for the purpose. This is the objection to it. It was signed by the attorney and another, as sureties, and there is no question as to their sufficiency. The attachment was dismissed upon the motion of the defendant.

The objection to this bond is not valid. The point has been settled in the case of *Lindner* v. *Aaron*, 5 How. 586. It is there decided, "that, upon motion to dismiss the attachment, the court cannot look beyond the face of the bond itself; if it be valid upon its face, that is sufficient. The authority of the agent is matter *aliunde*, and forms no part of the bond." If an action were brought upon the bond, the defendants could only avoid it, upon the plea of *non est factum*, and it is not competent to the court, upon mere motion, to enter into such examination. Acquiescence under the act of the attorney, or a subsequent recognition of it, would render it as obligatory upon the parties, as a previous authority.

Neither do we think the objection to the affidavit can prevail. The attachment is sued out under the act of 1844, p. 125, chap. 15. It provides that the affidavit shall state that the debtor is about to remove from the state, or has removed, or is about to remove, or has concealed, or is concealing or removing, or about removing his effects, so that the claim will be defeated, or cannot be made; and the facts shall be stated in the affidavit to be within the personal knowledge of the applicant, or that he is informed and believes the facts to be true.

In this case, the affidavit sets out, with a good deal of care, a statement of the facts in regard to the conduct of the defendant, which form the foundation of the belief of the affiant, that Reuben King is concealing his effects by the means stated, so that the claim will be defeated, and that he believes the facts stated to be true.

This affidavit seems to us to contain all that the statute requires, and to be even more full than necessary. A portion of the argument against it, is drawn from unnecessary averments. The concealment of his effects by King, is the ground of the attach-

Digitized by Google

ment, and the averment of that fact is stated with sufficient distinctness. The surplusage cannot vitiate.

Neither do we perceive any such variance, between the attachment and the affidavit, as will authorize its dismission.

Judgment reversed, and cause remanded.

Digitized by Google

ARTHUR M. M. UPSHAW et UX. *vs.* SEABORN HARGROVE, Administrator of W. T. Carythers.

A vendor of land who takes no separate or other security for the purchase-money, retains a lien upon the land for its payment; and none but *bona fide* purchasers, without notice can set up an implied waiver of this equitable mortgage.

To constitute a *bona fide* purchaser without notice, the party must have advanced a new consideration, or have relinquished some security for a pre-existing debt.

W. purchased a tract of land of H.; and agreed to pay for it with other lands if title could be had to them, if not with a stipulated sum; upon which H. conveyed the land to W.'s wife; the title to the other lands not being made, H. filed his bill against W. and wife to subject the land sold by him, to the payment of the stipulated sum, the purchase-money thereof: *Held* that the land was subject to the vendor's lien.

Whether an award upon the *voluntary submission* to arbitration by the parties, made by the arbitrators without notice to the parties, is void — *Quære.*

Where a bill in chancery sets up an award of arbitrators, and traces the claim of the complainant through it, the award will be held *prima facie* good, on *pro confesso*, even though the bill does not aver that the award was made upon notice.

Where the demurrer to a bill is overruled and the defendant allowed ninety days in which to answer; and the complainant die before the next term of the court, and the bill is revived at that term in favor of the administrator of the complainant; and on the same day of the revival, the defendant having failed to answer, the bill is taken for confessed against him, and a decree entered accordingly, it will be error; the defendant should have been allowed some day for the purpose of answering the bill of revivor.

IN error, from the district chancery court, held at Holly Springs; Hon. Henry Dickinson, vice-chancellor.

On the 25th of April, 1844, Wilson T. Caruthers filed his bill in the vice-chancery court, in which he alleged that Arthur M. M. Upshaw and himself entered into a written agreement on the 18th of December, 1839, in these words, viz. "Whereas Wilson T. Caruthers, of Holly Springs, Miss., has this day ex-

Digitized by Google

ecuted to Ann Hamilton Upshaw and her heirs, his deed for two sections of land, viz.: Sections ten and fifteen, township four, range one, west, Chickasaw cession, N. Miss.; in consideration of my having given to said Caruthers heretofore an order on Colbert Moore to convey to him my undivided one half interest in five and a half sections land in Chickasaw county, North Miss., being the Tomshek's settlement of land; and whereas said Caruthers and myself entertain a doubt about the value of said undivided interest of five and a half sections land, and believe there will be a balance due said Caruthers upon the exchange: Now therefore, it is hereby agreed mutually by the parties, that Felix Lewis and Colbert Moore shall settle upon the difference due said Caruthers upon said exchange of land, and that the amount so settled upon by them shall be settled and paid out of a contingent interest that said Upshaw has in sections of land, viz. — Sections one and twelve T. 4, R. 9 W.; southern division of Sec. 4, T. 1, R. 4 W.; Sec. three, T. 10, R. 2 W; Sec. twenty-nine, T. 9, R. 9 E.; all of which latter lands are in the hands of F. Lewis and Daniel Saffaraus to get titles perfected, &c. And in case said titles all fail to be perfected, then the amount above settled upon and by this arrangement to be paid to said Caruthers by said Lewis out of the proceeds of said land is to be yet due and to be paid to said Caruthers by said Upshaw."

This agreement was signed by Upshaw and Caruthers. The complainant filed also a copy of the deed from himself to Mrs. Upshaw, the wife of Arthur M. M. Upshaw; and averred further, that Felix Lewis and Colbert Moore had indorsed on the back of this agreement the following award, viz.

" We, Felix Lewis and Colbert Moore, having met at Holly Springs, Miss., this the 4th day of January, 1840, for the purpose of settling the difference between Col. A. M. M. Upshaw's undivided interest in the Tomshek's land and W. T. Caruther's two sections in Marshall county, viz. Sections ten and fifteen, T. 4, R. 1 West, do hereby agree in accordance with our appointment as valuers or appraisers of the relative value of the respective tracts of land of said Upshur and Caru-

Digitized by Google

thurs; that there is a difference of three thousand dollars in favor of said Caruthers, which sum of three thousand dollars we hereby award to said Caruthers from said Upshaw.

FELIX LEWIS,
COLBERT MOORE."

The bill further averred, that the title to all the lands specified in the articles as in the hands of Lewis and Saffaraus failed, and that no part of the three thousand dollars had been paid; that the title to the land sold by him was still in Mrs. Upshaw, to whom it was conveyed at the instance of her husband, for the consideration expressed in the articles of agreement, and no other; that Mr. Upshaw and his wife were non-residents, and that unless the land thus conveyed to Mrs. Upshaw was subjected to the payment of this $3000, the debt would be lost. The bill prayed accordingly.

The defendants demurred to the bill on the following grounds: 1. That the bill was filed upon an indebtedness growing out of an award, and it did not show or state that the defendants, or either of them had any notice to attend and be heard at the arbitration. 2. That there was no averment that the three thousand dollars had ever been demanded. 3. That the execution of the deed to Mrs. Upshaw and the taking of the separate obligation of Mr. Upshaw to pay any balance due on the lands conveyed, was a discharge of the equitable lien on the land. 4. That Mrs. Upshaw was not charged with notice of the agreement between Caruthers and her husband, or of the unpaid purchase-money, and therefore her title to the land would be free from the incumbrance. 5. The complainant conveyed to Mrs. Upshaw and took Mr. Upshaw's bond to pay the debt, which released the vendor's lien.

At the January term, 1845, the demurrer was overruled, and the defendants allowed ninety days in which to answer.

At the July term, 1845, the death of the complainant was suggested and leave given to revive in the name of Seaborn Hargrove, administrator of complainant. At the same term, on the 12th day of July, Hargrove filed his bill of revivor, and on the same day, the defendant failing to answer within the time

Digitized by Google

allowed, the bill was taken for confessed and a decree signed two days after, ordering a sale of the land by a commissioner of the court to pay the debt due to the complainant.

The defendants sued out this writ of error.

Totten and *Bradford*, for appellants.

The main point in controversy is, whether, upon the state of facts presented by the bill, the complainant was still entitled to, or had waived, his vendor's lien on the land which he conveyed to Mrs. Upshaw.

The doctrine in regard to the circumstances which will be held to have waived the lien of a vendor of land for his unpaid purchase-money, seems now to be firmly settled, in America, at least; and the present rule we apprehend to be, that the lien is waived whenever the vendor accepts, for the purchase-money due him, the responsibility of a third person, or other independent security, or does any other act which, even by implication, evinces his intention not to look to the land itself as a security. 4 Kent's Comm. 153; *Fish* v. *Howland*, 1 Paige Ch. R. 20; *Eskridge* v. *M'Clure et al.* 2 Yerger, 84; *Phillips* v. *Saunderson et al.* 1 S. & M. Ch. Rep. 562.

Let us apply that rule to the case disclosed in this record. Caruthers conveys land, in fee, to Mrs. Upshaw, and takes the obligation of her husband for the balance of the purchase-money, agreeing with him, also, in regard to the mode in which that balance shall be ascertained. He goes even further than this, and stipulates that such balance shall, when ascertained, be paid — *not* out of the land conveyed to Mrs. Upshaw, nor even by Upshaw himself in the first instance, but out of the interest of Upshaw in other lands, the titles to which were not then perfected. It was only in the event that those titles should not be perfected, that he was to have a personal claim upon Upshaw for the money.

Here, then, we have the case of a vendor who has taken no note, bond, or other obligation from his vendee for the payment of the purchase-money due him, but who, by an independent agreement with a third person, has taken, as a security for that

Digitized by Google

money, a kind of equitable mortgage upon a contingent interest in other lands, and, moreover, has bound himself, in express terms, to look to that third person for payment in case of the failure of that contingent interest; thus showing, by necessary implication, that his intention, at the date of the agreement, was to look for payment, first, to Upshaw's contingent interest in the other lands, and, if that fund failed, then to Upshaw himself, and not, in any event, to the land conveyed to Mrs. Upshaw.

If any further evidence were wanting to show that the vendor in this instance intended to part with his lien, it would be found in the fact that, under a contract with Upshaw alone, he conveyed the land in question to a third person, in fee.

Under this view of the case, we believe the decree of the vice-chancellor must be reversed; but as other grounds were taken in the demurrer, we crave permission briefly to advert to them.

1st. It is not alleged in the bill that Upshaw was ever notified that the arbitrators were about to make their award, so that he could be heard before them. Their award, therefore, must be regarded as a nullity. *Peters* v. *Newkirk*, 6 Cow. 103; Kyd on Awards.

2d. There is no allegation in the bill, that payment of the sum awarded has ever been demanded of Upshaw. The decree directs the payment of the amount awarded, with interest from the date of the award. To the extent of the interest, at least, the decree is clearly wrong. 2 Stark. on Ev. 7th Am. ed. 1st part, 117; and Kyd.

3d. It is not alleged in the bill that Mrs. Upshaw was privy to the agreement between Caruthers and her husband, or that she ever assented to its terms. We insist, therefore, that her interest cannot be affected by the provisions of that agreement.

Further, we contend that, even admitting the existence of a vendor's lien in this case, the complainant has an unembarrassed remedy at law against Upshaw, whose non-residence furnishes no ground for an application to a court of equity, without an allegation of his insolvency or of the exhaustion of his per-

Digitized by Google

sonal property; and we believe we may safely affirm, that the decree for the sale of Mrs. Upshaw's property, under this bill, is without a precedent in its support.

Again. What evidence had the vice-chancellor that Hargrove was the administrator of Caruthers? No copy of his letters is filed with his bill of revivor. We have had no opportunity, either to answer the original bill or to contest the claim of Hargrove to the character which he has assumed. The suit having abated by the death of Caruthers, we could not file our answer. And if any one who chooses to do so, can come into court of chancery, and, by his unsupported claim to be an administrator, *instantly* stifle all investigation into his claim, and prevent all further litigation in an abated suit, without notice to those who are to be affected by his proceedings, he must do it by virtue of some arbitrary rule, unknown to us, which would be far "more honored in the breach than in the observance." Story on Eq. Pl. 301, and n. 4.

Mr. Justice CLAYTON delivered the opinion of the court.

The main question in this cause, is whether the vendor, under the circumstances, retained any lien upon the land which he conveyed, for the purchase-money. The circumstances relied on to defeat the lien, are that the land was sold to Arthur M. Upshaw, and his written agreement taken for the adjustment of the price, but the land was conveyed to Ann Hamilton Upshaw, the wife of the appellant. The agreement as to the payment was, that other lands should be conveyed by A. M. Upshaw, in the Chickasaw cession, the titles to which were not then complete; but if the titles to the lands designated should not be perfected, then the sum to be paid in money in lieu thereof should be ascertained by the award of Felix Lewis and Colbert Moore. The titles were not perfected, and the sum of *three thousand* dollars was awarded as the price to be paid.

The doctrine is now well settled, that a vendor of land, who takes no separate or other security for the purchase-money, retains a lien upon the land for its payment; and none but *bona fide* purchasers, without notice can set up an implied waiver of

Digitized by Google

this equitable mortgage. *Stafford* v. *Van Renssalaer*, 9 Cow. 318. To constitute a purchaser of that character, the party must have advanced a new consideration, or have relinquished some security for a preëxisting debt. *Dickinson* v. *Tillinghast*, 4 Paige, 215; *Gouverneur* v. *Titus*, 6 Paige, 347; *Barnett* v. *Dunlop*, MS. Op. this court. We cannot think that Mrs. Upshaw occupies this attitude. She is a mere volunteer, no consideration appears to have moved from her either to her husband or to Caruthers, for this conveyance. She derived her title directly from Caruthers; there was no intermediate conveyance, and she could not but know, that she had not paid for the lands. She does not come within the rule of exemption, and the lien must therefore be recognized as in full force.

The next objection is, that the valuation of the lands by Moore and Lewis does not appear to have been made after notice to the parties. The authorities are not uniform as to this rule of notice. A distinction is made between those cases in which the submission to arbitration is the voluntary act of the parties, and those in which it is under rule of court. In the former, proof of notice seems not to be necessary, all that is required is proof of the execution of the award according to the submission. *Miller* v. *Kennedy*, 3 Rand. 2. This was a case at law, and so was the case in 1 Saund. R. 327, referred to in its support. In the latter case, although the defence was excluded at law, the party filed his bill in the exchequer and obtained relief, upo ı the ground of corruption and partiality in the arbitrators. The case of *Peters* v. *Newkirk*, 6 Cowen, was a case of voluntary submission. The court paid no attention to the distinction above adverted to, but said the award without notice was a nullity. Only one case was referred to in support of the opinion, (4 Dallas, 222,) which was an award under a rule of court. By statute in Pennsylvania too, the rule is different from the common law rule in this, that an award under rule of court may be set aside for error of law or of fact, when made manifest. Kyd on Awards, 380, n. It is not necessary, now, to decide between these conflicting rules. The award set out in the bill is *prima facie* good. The presumption

Digitized by Google

is in its favor. If from partiality, corruption, or other cause, it is bad, the circumstances which establish it must be made to appear.

The last objection is, that the decree was pronounced prematurely. At the January term, 1845, a demurrer to the bill was overruled, and the defendants allowed ninety days to answer. Before the succeeding court the complainant died, but whether before the expiration of the ninety days, does not appear. At the July term, 1845, the death of the complainant was suggested, and a bill of revivor filed by the administrator. On the same day, this order was entered: "The defendant, having failed to answer within the time allowed at the last term, it is ordered that the bill be taken for confessed." This was erroneous. Notice of the application to revive is necessary. 2 Paige, 477; 2 Mad. Chan. Pr. 533. The defendant must have some time to put upon the record what is necessary to show, if such be the fact, that the person reviving is not entitled to do so. When a revivor becomes necessary by the death of a defendant, who has not answered, the plaintiff must have an answer to both the original bill and the bill of revivor. 11 Ves. 312. Upon bill of revivor, according to the English course of practice, the party is entitled to eight days to answer it. Mit. Pl. 118; and he was in this instance certainly entitled to some day for the purpose.

For this error the decree is reversed, and the cause remanded.

Digitized by Google

JOHN HAZLIP et al. Administrators of Joseph Galtney, *vs.* PIERCE NOLAND.

Where a party executes his notes payable at fixed periods, for the purchase of a tract of land, and receives from the vendor a bond to make title to the land, and the vendor sue on the notes to recover the purchase-money, the contracts are independent and the vendor may recover, although he has not made a deed to the land.

Where a vendor of land in his bond for title, describes the land as lying on a certain creek in the county, in certain sections, without giving the particular subdivisions of the sections or the township and range in which the land lies; the description of the land will be sufficient to uphold the consideration of the notes given for the purchase-money; as the location on the particular creek removes the uncertainty as to the subdivisions and township.

Where a vendor of land has given a bond for title, without affixing any time in which it is to be made, and takes notes payable at a fixed time for the purchase-money; and afterward, but before the notes are paid, executes a defective deed to the vendee, he will not thereby be deprived of his right to recover upon the notes; as the execution of the defective deed does not absolve him from the obligation of his bond to make a good title; which the vendee may still demand.

Whether where a vendee of land, who has a bond for title from the vendor, dies before paying the purchase-money, and his administrators are sued therefor, the administrators can object to a deed from the vendor, made but not delivered before the vendee's death, for insufficiency or imperfection, so as to call in question the validity of the title to the land, by way of assailing the consideration of the notes? *Quære?*

Whether where a vendor, who has given a bond for title, recites in his deed conferring title, that he grants, bargains and sells the land, and in the conclusion of the deed warrants the title only against himself and heirs, he thereby limits the statutory warranty given to the words grant, bargain and sell? *Quære?*

A warranty does not pass title, but only secures an indemnity if there be incumbrances; a vendor of land, who has given a bond to make title, it seems therefore may, under some circumstances, comply with his bond by giving a deed to the land with special warranty.

IN error from the Adams circuit court; Hon. Charles C. Cage, judge.

Digitized by Google

Pearce Noland sued John Hazlip and Charlotte Galtney, administrator and administratrix of the estate of Joseph Galtney, deceased, upon four notes, one for $350, and the others for $1066 each, dated January 1, 1840, and due in four consecutive years; and also upon an open account. The defendants plead *non assumpsit* by their intestate. The case was submitted to a jury, who found for the plaintiff.

By the bill of exceptions, sealed at the instance of the defendants, it appears that the plaintiff rested his case after reading the notes sued on. The defendant then offered to introduce in evidence the following title-bond of the plaintiff, viz.:

Know all men by these presents, that I, Pearce Noland, of the county of Warren and state of Mississippi, bind myself, my heirs or assigns, for six hundred and forty acres of land, lying and being in Octilbeha county, on a branch called Cypress Creek; the lots are described as follows, to wit: three quarter sections in section seven; in section five, one-eighth; in section four, one eighth. The condition of the above obligation is this, if P. Noland, his heirs or assigns, cause to be made a lawful and complete title to the above described tract or parcel of land to Joseph Galtney, his heirs or assigns; then and in that case the above obligation to be null and void, otherwise to remain in force and virtue.

Given under my hand and seal this the 3d day of January, 1840.

PEARCE NOLAND. [L. S.]

The defendants at the same time stated to the court, that they would endeavor to show from said bond and by parol testimony, that the notes sued on were given in consideration of certain lands situated in the county of Octilbeha, state of Mississippi, and mentioned in said bond; that the said Joseph Galtney died on the third day of January, 1842, and that during his lifetime, the plaintiff did not make a conveyance to him; that after the death of Galtney, the plaintiff, in March or April, 1842, sent the following deed to the defendants, viz.:

Digitized by Google

"This indenture, made this tenth day of December, one thousand eight hundred and forty-one, between Pearce Noland and Elizabeth his wife, of the county of Warren, and state of Mississippi, of the first part, and Joseph Galtney, of Adams county, and state aforesaid, of the second part; witnesseth, that the said party of the first part, in consideration of the sum of five dollars per acre, to them in hand paid by the said party of the second part, the receipt whereof they do hereby acknowledge, hath granted, bargained, sold, released, and confirmed; and by these presents do grant, sell, bargain, release and confirm unto the said party of the second part, and to his heirs and assigns forever, all that tract of land situate, lying and being in the county of Octilbeha, state aforesaid, and more distinctly known as the east half and southwest quarter of section No. 7, (say seven,) and the east half of the southeast quarter of section No. 6, (say six,) and the west half of the southwest quarter of section No. 5, (say five,) all of township seventeen, north of range thirteen, east, in the Columbus district of the public lands, containing six hundred and forty acres more or less; together with all and singular the hereditaments and appurtenances whatsoever, to the same belonging and appertaining, to have and to hold the said lands, tenements and hereditaments, and all and singular other the premises herein before mentioned, with the appurtenances unto the said party of the second part, his heirs and assigns, and to his and their only proper use and behoof. And the said party of the first part, and their heirs all and singular the aforesaid lands, tenements, hereditaments and premises, and every part and parcel thereof unto the said party of the second part, his heirs and assigns against them the said party of the first part, their heirs and assigns, shall and will forever warrant and defend by these presents. In witness whereof we have hereunto set our hands and seals the day and year above written.

PEARCE NOLAND, [L. S.]
ELIZABETH NOLAND. [L. S.]

State of Mississippi, Warren County.

Personally appeared before me, Alfred H. Rowlett, clerk of

Digitized by Google

the probate court of said county, the above-named Pearce Nowland, and Elizabeth Noland his wife, who acknowledged that they signed, sealed and delivered the foregoing deed, on the day and the year therein mentioned, as their act and deed. And the said Elizabeth Noland, wife of Pearce Noland, being by me privately examined, separate and apart from her said husband, acknowledged that she signed, sealed, and delivered the same freely and voluntarily, without any fear, threat or compulsion of her said husband.

Given under my hand and seal of office this 15th day of December, 1841. A. H. ROWLETT, *Clerk.*

That the defendants did not accept the deed, and never took possession of the land, nor did Galtney in his lifetime ever have possession of it. The court refused to permit any of this testimony to go to the jury.

The defendants prosecute this writ of error; and now assign for error: 1, the refusal of the court to allow the introduction of the documentary and parol evidence offered; 2, in not allowing the title-bond to be read, to show the failure of consideration of the notes.

Dubuisson, for plaintiffs in error.

1. The first inquiry is, were the covenants between the parties mutual and dependent, or mutual and independent? If mutual and dependent, the court was bound to let the whole matter go to the jury. It is a settled rule, that where two acts are to be done at the same time, neither party can maintain an action without showing performance. 7 Term R. 125; 1 Salk. 112, 171; 1 Sanders, 920; 2 Johnson, 207; 15 Ibid. 267; 17 Ibid. 243.

The law which requires the tender of a deed, requires that deed to be operative; the tender of a defective deed, void for want of covenants, or for insufficient description, or other material defect, would not be a performance; the deed tendered in this case is imperfect and inoperative, both in covenants and description of the property. Fourteen or fifteen townships were

Digitized by Google

in a county; sections of the same number must occur in them; while the designation of Cypress Creek was too uncertain. The deed was not delivered until after the death of Galtney; it took effect from delivery, and not from date, and should have made therefore to the heirs.

2. If the covenants be mutual and independent, the only relief of the defendants was in a court of law. The bond is the consideration of the notes; if that be invalid, the notes are so. We can only show the invalidity of the bond by introducing it. The bond is void for uncertainty. 3 How. 231, and authorities there quoted; 1 Pick. R. 31; 16 Mass. R. 86; Sugden on Vendors, 114, 115.

The description of land in a deed must be given with sufficient certainty to distinguish the lands from other lands. 4 Cruise Dig. 204, § 20, 221, 635; 4 Mass. R. 205; 13 Johns. R. 102, 103; 8 Peters, 84. If Galtney had taken possession, the description might have been less uncertain than otherwise would have been required. Free. Ch. R. 53, and authorities quoted.

The rule of law that requires an eviction before a defence can be made to payment of notes given to the vendor for the purchase-money of lands does not apply here, because neither the appellants nor their decedent ever were in possession, but always refused the deed as insufficient. Even this rule of law has been relaxed to some extent. In a case in 11 Johns. R. it is decided, that a purchaser in a suit at law upon his note given to vendor for the purchase-money of land, may be allowed to show, in his defence of the note, a total failure of consideration, notwithstanding he has deed with full covenants, and had not been ejected, and the reason given by the court for this is, that circuity of action would be prevented. *Frisbie* v. *Hoffnagle*, 11 Johns. 50, and the cases there quoted.

The reasons in that case apply with double force to the one before the court. There the defendant was in possession, but about to be evicted; here the defendants have never been in possession, but their bond is void, and under it they never can have possession. Courts will not decree parties when full justice can be done in the courts of law.

Digitized by Google

The conclusion to which we are brought is:

1. If the covenants are mutual and dependent, Noland must show performance before he can recover, or if he has made an attempt to perform his part of the contract, he has brought himself within the rules of law applicable to mutual and dependent contracts. The defendant may show that he has failed, and this may be done in a court of law.

2. If the covenants are independent, then we have a right to show that his bond, containing the covenants, is void for uncertainty; that the consideration of the notes has entirely failed, and that a court of law, in suit on the notes, is the proper place for this investigation.

3. That we were entitled to introduce the testimony, and have the whole matter passed upon by a jury.

Quitman and *McMurran*, for defendants in error.

We rely on the following points, on behalf of the defendants in error.

1. The record shows that the agreements or obligations of the intestate, Joseph Galtney and the defendants in error, are entirely distinct and independent of each other. Galtney gives his three several promissory notes to Noland, without any consideration annexed to their payment; and Noland gives his bond to make title to a tract of land to Galtney. The one relies on the notes, the other on the bond he holds. Each must pursue his own remedy, if there should be a non-compliance of the other with his engagement; and a performance by one is not necessary to entitle the other to sue.

The authorities cited by the opposite counsel sustain this position. See also *Hageman* v. *Sharkey*, 1 How. R. 277; 1 Saund. R. 319, 320; Case 54, *Pardge* v. *Cole*, and also note 3.

When the promise to pay is independent of the covenant to make title, he may maintain an action without showing that he has made title. In no case could the promise be more independent of the covenant or obligation to make title than in the present.

2. It is contended that the bond is void for uncertainty, and

Digitized by Google

that the deed differs from it regarding one or two of the pieces of land. We think otherwise. The bond describes certain fractions of sections of land in Cypress Creek, in Octilbeha county. There is no evidence to show that there are other pieces of land of the same description on that creek, and therefore there is sufficient certainty. 4 Wheat. R. 444.

But the deed is complete as to the description of the land; it was fully executed in Galtney's lifetime in due form of law, and is conclusive in Noland as to the land. The deed is in possession of plaintiffs in error, and produced by them, and if there should be any land in the deed different from that in the bond, that difference would not be a subject-matter of defence in an action of *assumpsit* against the administrators of the deceased. It would at the utmost be but a partial failure of consideration, which cannot be set up as a defence at law.

Besides, Noland cannot be considered in default, so that suit could be maintained against him in chancery for title, or on the bond for damages until a title had been demanded by the heirs of Galtney, and he had refused to make it. In which must they have their remedy? And the fallacy of the position of the opposite counsel is manifest, by the bare statement that if the administrators were to succeed in this case, the heirs of Galtney are entitled to the deed set forth in the record, or to have a correct one made to them through the court of chancery.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

Noland brought this action on four promissory notes made by Joseph Galtney in his lifetime, against the plaintiffs in error as administrators. On the trial, they offered to introduce a title-bond for a section of land which had been given by Noland to Galtney, and stated at the same time that they would endeavor to show from the bond, and by parol evidence, that the notes were given for land lying in Octilbeha county, mentioned in the bond — that Galtney died on the 3d of January, 1842, and had not, during his lifetime, received a conveyance; that in March or April, 1842, Noland sent to Galtney's administrators a deed for the land, which bears date some time prior to Galtney's

Digitized by Google

death, which they also offered to read, but this evidence was rejected.

It is insisted that the evidence should have been admitted, because the covenants of the parties are mutual and dependent, and that Noland cannot recover until he makes a good title to the land, which, it is said, he has not done, inasmuch as the deed is void for ambiguity in the description of the land. There is no objection arising out of any imperfection in Noland's title. In principle, there is no difference between this case and the cases of *Hageman* v. *Sharkey*, 1 How. 277, and *Gibson* v. *Newman*, Ibid. 349; in both of which the covenants, in contracts similar to this, were held to be independent; that the vendor was entitled to recover the purchase-money, although no title had been made. Noland agreed to convey, but when the title was to have been made does not appear. On the strength of that agreement, Galtney executed the notes, payable annually, relying on the security afforded him by the title-bond. By giving the notes payable in this way, without making the payments depend upon the execution of the conveyance, he manifested an intention to part with his money at all events, not upon a contingency only; and having omitted to protect himself by the contract, his administrators cannot say that Noland is bound to make title before he can sue for the purchase-money. The intention of the contracting parties is apparent, and must prevail.

But it is said, even if the covenants are independent, the bond is void for ambiguity, and is therefore insufficient as a consideration to make the notes valid. The bond describes the land as six hundred and forty acres, "lying and being in Octilbeha county, on a branch called Cypress Creek. The lots are described as follows, to wit: three quarter sections in section seven; in section five, one-eighth; in section four, one-eighth." The defect relied on is, that the township and range in which these sections are situated, are omitted in the description; that sections having these same numbers are to be found in every township, and that each county must contain a number of townships. This may be true, and unaided by other descriptive calls, the

Digitized by Google

description would be uncertain. But because there are other sections in the same county designated by the same numbers, it does not follow that those other sections lie upon Cypress Creek. That creek is the general or locative call; the sections the particular call. If it should turn out that there are other sections of the same numbers on that creek, then there is an ambiguity, but it is latent, arising not from the description in the bond, but from a collateral matter, or extrinsic evidence, and may be explained by parol testimony, on the principle that when there are two or more persons or things which answer the description in the instrument, parol testimony is admissible to show which was intended. Sugden on Vendors, 113; 1 Phil. Ev. 531, and note 939; *Jackson* v. *Goss*, 13 Johns. R. 518. If there be a defect in the description given by the bond, it is in the omission of the particular subdivisions of sections contracted to be sold. By law, sections are subdivided into sixteenths, eighths, quarters and halves; the description is of a certain portion of these sections, without stating which of the subdivisions was intended. But this apparent uncertainty, like the uncertainty in the sections, is removed by locating the parts of sections on Cypress Creek.

But it was insisted that as Noland had undertaken to perform, by making a deed before the suit was brought, he thereby made the covenants dependent; and if the deed be defective, he cannot recover. No authority was referred to in support of this position, and it seems to be opposed by the contract. Noland gave a general obligation to make a complete title, without appointing any time at which it was to be executed. He had a right to retain the title until the purchase-money was paid, or he was at liberty to make it sooner. He chose to make title before he was bound to have done so; but we cannot see how this could change the nature of defendant's promise to pay. By paying, the security of the bond still exists, and if the title made by Noland be defective, he may be compelled to make a good one. He did not discharge his own obligation by making a defective title; nor did he defeat his right by doing that improperly which he was not bound to do.

Digitized by Google

But the objections raised to the title made by Noland are without foundation. The objection is, that it is void because of a patent ambiguity in the description of the land. The description is, "all that tract of land, situate, lying, and being in the county of Octilbeha, state aforesaid, and more distinctly known as the east half and the southwest quarter of section No. 7; and the east half of the southeast quarter of section No. 6; and the west half of the southwest quarter of section No. 5, all of township seventeen north, of range thirteen east, in the Columbus District." No objection whatever is perceived to this description. It was said in argument that the range was omitted, but this seems to have been a mistake. There is a discrepancy between the description given in the bond, and that given in the deed in this, the bond calls for an eighth in section four, and the deed for an eighth in section six. If the deed be wrong, it may be reformed to correspond with the bond. The error, however, is most probably in the bond. No objection was raised to the covenants in the deed, and we must therefore suppose, that in this respect it is satisfactory. If it has been received by the heirs as a good deed, it amounts to a compliance with the bond. The only objection that could be urged to it is, that it only expresses on its face to warrant as against the grantor and his heirs. It however contains the words *grant*, *bargain*, *sell*, which are declared to be equivalent to a warranty of an indefeasible estate in fee-simple, and the seisin of the grantor. Whether the subsequent express warranty, as against the grantor and his heirs, limits this statutory warranty or not, we give no opinion. Even if it should do so, the title may still be complete within the language of the bond. The heirs are now the proper parties to object to it — they have not done so, and it may well be doubted whether the administrators can bring their title in question, and whether we could so adjudicate on it as to declare it inoperative for the purposes of this defence, as the heirs are not parties to the suit. If the title be complete, as it may be, even without general warranty, then Noland has performed his contract. There are cases in which a performance in effect, though not in manner, will be sufficient. *Worsley* v. *Wood*, 6

Digitized by Google

T. R. 722; Co. Lit. 207 a. If Noland derived his title directly from the United States, it is likely to be as good without a general warranty as with it, as the chances of an outstanding title are so remote as to make a general warranty very much a matter of form. A warranty does not pass the title; it only secures an indemnity if there be incumbrances.

The judgment must be affirmed.

Digitized by Google

6a 305
682 464

JAMES V. TAYLOR vs. CALEB S. MANLEY.

Where a case has been submitted to a jury, and they have retired to consider of their verdict, it will be error for the court, without the consent of the parties, to explain, at the request of the jury, a matter of law to them, bearing upon the case, upon which they notified him they had doubts.

IN error, from the circuit court of Monroe county; Hon. Stephen Adams, judge.

James V. Taylor sued Caleb S. Manley, for the price of brick work done by the former for the latter. A trial was had, and the jury found for the defendant.

The bill of exceptions, taken on the overruling a motion for a new trial, states the following facts, viz.: "After the jury had retired from the bar, with leave to give and return their verdict to the clerk, and the court had been adjourned until the next morning, the judge returned to the court-house, and without calling the parties in the case, and in the absence of the attorneys, and while the court stood adjourned, the jury returned, and, after sending for the judge, stated that the jury differed as to the law, and inquired of the court if, where a man made an entire contract, he was compelled to comply with it before he could recover for what he had done?" Upon which the judge stated to the jury, "that if one man received benefit from another's labor he was bound to pay for it, although the contract was entire, and not complied with; but in such case the party would be entitled to a deduction of the damages sustained, in consequence of the plaintiff not complying with his contract." The jury having found for the defendant, the plaintiff prosecuted this writ of error.

J. F. Jack, for plaintiff in error.

The judgment below ought to be reversed also, because the judge, after the court had adjourned, and in the absence of the

Digitized by Google

parties and their attorneys, without even having them called, and without being thereto requested by either party, instructed the jury as to the law relative to a special contract, and charged them erroneously, and by his charge mislead the jury, and caused them to find an erroneous verdict. This untimely and uncalled-for exercise of the judicial functions is manifestly irregular, and finds perhaps no parallel in the whole history of courts of judicature. The court was out of session; there was no court. The parties, and their counsel, absent, in consequence of the adjournment. And the judge had then no more legal authority to return to the court-house and charge the jury than had any individual, entirely disconnected with the court. But if such a practice were competent and proper, or even had the court been in session when the charge was delivered, yet it was given in direct violation of the statute of this state, which provides, that no point or principle of law shall be given in charge to the jury, unless one of the parties to the issue, or counsel, shall ask the judge to give such charge. H. & H. 482. The charge was irregularly given, and erroneous, and wholly gratuitous; and a judgment founded upon such proceedings cannot be good.

Davis, for defendant in error.

When a case has been argued by counsel, it is submitted to the court, composed of judge and jury: the jury, to determine the weight of the evidence, and the judge to furnish them information in relation to the law. The powers of the court cannot be arrested by the attorneys in the cause absenting themselves for any purpose. But in this the counsel for appellant has no cause of complaint; because the charge of the court was directly in favor of his client, and against appellee.

Mr. Justice THACHER delivered the opinion of the court.

The bill of exceptions in this case, taken to a motion for a new trial overruled, among other things, shows that, after the jury had retired with the case, for the purpose of forming their verdict, and, after the court had been adjourned until the suc-

Digitized by Google

ceeding day, the jury returned into the court-house, and the judge, without the consent of the parties in the action, or their counsel, upon the request of the jury, explained a matter of law to them, bearing upon the case upon which they notified him that they entertained doubts.

The statutes of this state, H. & H. 482, sec. 9, and 493, sec. 53, explain and provide the mode and extent in which a judge is permitted to charge a jury on points or principles of law applicable to a case before them. These provisions are restrictive of the common law powers of judges in this particular, and any substantial deviation from them is good ground of error. The instance in the present case we deem a deviation of this kind.

Judgment reversed, and new trial awarded.

Digitized by Google

JAMES J. SMART *vs.* JANE WHALEY.

J. W. filed her petition for dower in the lands of her alleged husband G. W.; J. S., the grantee of her husband, contested her right of dower, on the ground that she was not the wife of G. W.; on the trial of the petition it was proved that J. W. was married to G. W., in 1814; and that, in 1815, M. F. who had been married in 1809 to G. W. was alive; G. W. and J. W. after their intermarriage* lived together as man and wife for twenty-five years, until the death of G. W.: *Held*, that the wife of G. W. being alive when he married J. W., the latter marriage was absolutely null, and J. W. not his wife, and therefore not entitled to dower in his lands.

IN error from the probate court of Pike county; Hon. Christian Hoover, judge.

Jane Whaley filed her petition in the probate court of Pike county, for an allotment of dower out of certain lands; representing herself as the widow of George Whaley, who died seised thereof. James J. Smart, the tenant in possession, filed a petition in the same court, alleging that he was the owner and possessor of said lands, by purchase from the grantee of said George Whaley, and that Jane Whaley was not his lawful wife, whereupon by leave of the court he was admitted to defend the suit, and filed his answer to the petition; in which he denied that the petitioner was ever the lawful wife of George Whaley, alleging that the said George Whaley was lawfully married to one Margaret Field, in the year 1810, in the state of Tennessee, and who was living and undivorced at the time the petitioner married Whaley.

Michael McNulty, on the part of the petitioner, testified that he knew the petitioner and George Whaley had lived together as man and wife for twenty-five or thirty years, but that during a portion of that period they had lived separate.

* It did not appear in the case when M. F. died, if at all.

Digitized by Google

The defendant then proved by Louisa Quinn, that about the year 1810, George Whaley lived with one Margaret, whose maiden name was Field, as man and wife, and that common reputation said they had been married, and that they were received as man and wife in the community in which they lived; that said Margaret was living in the state of Tennessee in the latter part of the year 1814, or the beginning of the year 1815.

Mary Wilson and Sarah Richmond testified that they knew George Whaley married Margaret Field in Tennessee in 1809 or 1810, and that she was living in 1811 when they left that state, and they had never heard of her death. Mrs. Jane Bigner testified that she knew George Whaley, and Margaret Field, and lived in the neighborhood when they were married, in Tennessee; was not present at the ceremony, but that the parties lived at said Margaret's father's, as man and wife; that this was before the marriage of George Whaley to the demandant, which witness stated took place in the county of Amite, in this state, in the month of February, 1814; that the petitioner admitted to witness, about five years since and in the lifetime of Whaley, that she was not his lawful wife, and that Whaley had a lawful wife then living.

William Woodall testified, that shortly after the marriage between petitioner and George Whaley, and during an angry controversy between them, which witness was trying to appease, he heard petitioner say that she was not the lawful wife of Whaley, and that she knew before and at the time of her marriage with him that he had a lawful wife living. This was all the testimony. The cause was argued and submitted, and the court took the same under advisement, and at the ensuing term decreed that dower be allotted to the petitioner in the usual form; and the defendant appealed from this decree.

W. P. Harris, for appellant.

The grounds on which the claim to dower is resisted in this case are sufficient. In order to entitle a woman to dower she must answer the description of a lawful wife. Roper on Husband and Wife, 203.

Digitized by Google

The fact, that a prior marriage had taken place between George Whaley and Margaret Field, and that the latter was living at the time of the marriage to the petitioner, are clearly established. This prior marriage having taken place out of this state, the defendant below was relieved from the necessity of producing the certificate of the marriage, as foreign marriages are not necessarily provable by such evidence. This principle is well established by the same authority above quoted.

The witness Quinn proves that Margaret Field was living at the date of the second marriage, and after that period; and the same witness, together with two others, from personal knowledge, as well as from general reputation, prove that Whaley married Margaret Field in 1809 or 1810, in the state of Tennessee.

A question arises upon the case as stated, growing out of the decision in the case of *Van Buskirk* v. *Claw*, 18 Johns. R. 348. The principle which that case decides is, that though the first wife was living at the date of the second marriage, yet after the lapse of seven years from the time the first wife was known to be living, and was last heard of, she will be presumed to be dead; and subsequent continued cohabitation until the death of the husband will entitle the second wife to dower, on the presumption that a marriage in all respects legal took place after the seven years and presumptive death of the first wife, in analogy to the exceptions in the statute of bigamy.

The facts were that Van Buskirk cohabited with a woman, as man and wife, in 1779. In 1780 they separated. Six months after this separation he married another woman, with whom he continued to live as man and wife up to his death, a period of forty years, and had children, one of whom was thirty-seven years old. It was proved the last time the first wife was heard of was in 1783. On this state of facts the court held that the last wife was entitled to dower. It was admitted, however, by the court that the first marriage was not sufficiently proved. As this case will doubtless be relied on by the counsel for the appellee, it has been thought necessary to allude to it thus par-

Digitized by Google

ticularly, in order to point out the difference in point of fact, between that and the case at bar. In the present case it will be seen, that the only proof in reference to the second marriage is that of witness McNulty, who said that twenty-five or thirty years since, George Whaley and petitioner lived together as man and wife; that they were separated part of that time. Other witnesses, prove declarations of the petitioner during that period that she was not the wife of George Whaley. There is no proof of continuing cohabitation up to the death of George Whaley. It is decided, in the case above quoted, that separation after cohabitation, where there was no other evidence of marriage, rebutted the presumption of marriage. In the present case there was not only a separation, but the parties by their own conduct and declarations conclusively destroyed all presumptions arising from cohabitation. Independent of this want of analogy between the two cases in that feature which is essential to the application of the principle of the decision quoted, it can be shown that the presumptions indulged in that case, if they can arise at all, arise only in criminal prosecutions. According to the views expressed by Lords Eldon and Redesdale, in 2 Dow. 45, where the connection is proved to be meretricious in its origin, as where it commenced in the lifetime of the first wife, this presumption is not allowed even in criminal prosecutions for bigamy, and for an obvious reason. No presumption can prevail against the fact, that the second marriage took place while the first wife was living, because the crime is complete; and it is absurd to say that in favor of innocence this presumption will be indulged when guilt is admitted. It is insisted that in the present instance the proof would have been sufficient to convict George Whaley of bigamy, as it is clearly shown that he married a second wife while the first was living. The exception in the statute of bigamy is, substantially, that if the second marriage takes place seven (five by our statute) years after the first wife was last heard of, or not known to the husband, it shall not amount to felony. This exception, however, as has been repeatedly held in the English courts, does not operate to render the second marriage valid, but extends only to the felony. Petersdorf's Abr. tit. Marriage.

Digitized by Google

In conclusion, therefore, it is urged, that as the connection between the petitioner and George Whaley was illegitimate in its origin, and no subsequent actual marriage proved, and as this connection was interrupted by separation and its legitimacy repeatedly denied by the petitioner, and as there is no proof that it actually subsisted at the death of George Whaley, all presumptions of marriage from mere cohabitation are destroyed. This conclusion is fully sustained by the facts in the case, and warranted by the principles of law applicable to it. The decision of the court below was therefore erroneous, and should be reversed.

Mr. Justice THACHER delivered the opinion of the court.

Appeal from the probate court of Pike county.

Jane Whaley applied to the probate court for dower in certain real estate, alleging that she was the widow of George Whaley, deceased. The appellant filed his petition in the said probate court, setting forth that he was the owner and possessor of said real estate, by purchase from the grantee of said George Whaley, that said Jane was not the lawful wife of said George at the time of his decease, and praying to be made a party defendant to her application for dower in said real estate. Upon an order of said court, the appellant was made party defendant to the petition, and at the hearing, the following facts were disclosed by the evidence: That the said George Whaley was married to one Margaret Field, in the state of Tennessee, in the year 1809 or 1810, and that she was living in said state up to the last of the year 1814, or the first of the year 1815; that the said George Whaley was married to the appellee in the state of Mississippi in the month of February, of the year 1814; that the deceased and the appellee lived together as man and wife for twenty-five or thirty years, except a portion of the time, when they had separated; and that shortly after the marriage of the appellee with the said George, she acknowledged that she knew that she was not his lawful wife, and that she knew before, and at the time of her marriage, that the said George had a lawful wife living; and that very recently, she had ac-

Digitized by Google

knowledged that she knew that she was not the lawful wife of said George, because he had a lawful wife then living.

The probate court allowed the application for dower, whereupon the appellant brought the case into this court.

The marriage of George Whaley to Margaret Field seems to be sufficiently established by the evidence, and also that she was living at the period when the said George married the appellee in this state. In such a state of case the second marriage was null and void, and the appellee was not the lawful wife of the said George Whaley at the time of his death, and consequently was not entitled to dower in his estate.

If the validity of the marriage should hereafter be brought in question in any mode, the decision of this case in the probate court should not prejudice the rights of parties.

Judgment reversed.

Digitized by Google

LAWSON F. HENDERSON et al. *vs.* THE MISSISSIPPI UNION BANK.

If a plea of *nul tiel corporation*, under oath, be filed to a declaration by a bank on a note, and issue be joined thereon, and the bank introduce in evidence, a copy of the act of its incorporation, with proof of user under the charter, it is sufficient to entitle it to recover.

ERROR, from the circuit court of Madison county; Hon. John H. Rollins, judge.

This was an action of assumpsit, brought by the Mississippi Union Bank, against Lawson F. Henderson et al., to the November term, 1840, of the circuit court of Madison county. The declaration was founded on a promissory note for five thousand dollars, and in the usual form. The defendants pleaded *nul tiel corporation*, which was sworn to, and *non assumpsit*. The latter was withdrawn, and issue taken on the former. On the trial, the plaintiff read to the jury the promissory note sued on, the act, and supplemental act of the legislature incorporating the bank; and proved a user under those acts of incorporation, and rested the case. The defendants demurred to the evidence; the court overruled the demurrer, and entered judgment in favor of the plaintiff; and the defendants have brought the case to this court by writ of error.

J. L. Mitchell, for plaintiffs in error.

As appears by the record, defendants below withdrew the plea of *non assumpsit*, and relied upon the plea of *nul tiel corporation*, on which issue was taken. To support their suit, plaintiffs below read the original act incorporating the bank, and also the supplemental act, and also proved that there was a pretended corporation in the city of Jackson, claiming to act as a corporation under said acts of the legislature of Mississippi, to which evidence there was a demurrer. Not wishing to enter

Digitized by Google

into an argument on other points, which have been too much discussed already, I make this point to the court; that by the first article of the constitution of this state, "no man, or set of men, are entitled to exclusive, separate, public emoluments, or privileges from the community, but in consideration of public services;" that by section 4th, of the original act of incorporation of said bank, "the owners of real estate situated in the state of Mississippi, and who are citizens thereof, shall be the only persons entitled to subscribe;" that by the 18th section of the supplemental charter, the "public services" to be rendered by said bank are taken away or waived; that the state, and of course every citizen thereof, whether an owner of real estate or not, is liable for the payment of the bonds issued by said state, for the benefit of said bank; that although in many states it has been decided that a bill of rights is merely a nursery song, yet in this state, in the case of *Thompson* v. *The Grand Gulf Railroad and Banking Company*, 3 How. R. 247, the chief justice of this court has decided, the court concurring, that every portion of the constitution is to be sustained, although the legislature, or even popular prejudice, may be against it; that in the case of *Smith's administrator* v. *Smith*, 1 How. R. 102, this court has decided that sureties are not entitled to privileges to which others are not. If then sureties are a "set of men," (and we well know that every man can easily become a surety,) are not owners of real estate a "set of men," when we well know that every man, however willing, cannot become the owner of real estate? And the privilege of taking stock in this bank is confined to such. I therefore on this ground, ask the court for a reversal of the judgment below.

Charles Scott, for defendant in error.

1. The court below did not err in overruling the demurrer, and giving judgment.

The act of incorporation, and acts of user under it, coupled with the fact of contracting with it, is sufficient evidence of the corporate existence of the bank. 3 Wend. 296; 1 Ib. 555.

2. The act of the legislature or charter declares the Missis-

Digitized by Google

sippi Union Bank a corporation, which renders it unnecessary to prove even acts of user, &c.

Mr. Justice THACHER delivered the opinion of the court.

The bank instituted suit upon a promissory note, to which action the defendants below filed a plea of *nul tiel corporation*, with affidavit, upon which issue was made up. The bank introduced in evidence, a copy of its act of incorporation, together with proof of user under the charter. To this evidence a demurrer was filed by the defendants below, which was overruled by the court, and judgment given for the bank.

The demurrer was properly overruled, since the evidence was proper and sufficient in behalf of the bank under the state of pleadings. Ang. & Ames on Cor. 504, and authorities there cited.

Judgment affirmed.

Digitized by Google

JOSIAH GROVER et al. *vs.* WILLIAM GAUNT.

Where to an action on a bond, the defendant pleaded that the bond was given for the hire of a negro for a year, and the negro was taken out of the defendant's possession on a certain day, before the expiration of the hire by the payee of the bond; to which the plaintiff replied, in substance, that the contract of hire was, that the plaintiff might, at any time, take possession of the negro by deducting twelve dollars per month for the unexpired time, and possession had been accordingly taken; to which replication the defendant demurred, and the court overruled the demurrer, and gave judgment final against the defendants for the amount due upon the bond, after deducting the period of the negro's absence; *held*, that the judgment final was erroneous; the court should have awarded a judgment with a writ of inquiry.

To a declaration on a bond for payment of money, the defendant plead that the bond was executed for the hire of a negro by the plaintiff to the defendant, from January 1, 1841, to January 1, 1842, and that the negro, during that period, should not be removed from the defendant's possession; yet the plaintiff did, on the 3d of May, 1841, take the negro out of the defendant's possession, by which the consideration of the writing obligatory had failed; the plaintiff replied, that when the negro was hired it was agreed between the plaintiff and defendant, that if the plaintiff should want the negro before the first day of January, 1842, the defendant should give her up, deducting twelve dollars per month for the unexpired time; and that the defendant had the negro until the 3d of June, 1841, *without this* that the plaintiff agreed that the negro should stay the whole year as averred by the defendant; *held*, on demurrer, that the plea was good in substance and form.

If the action be founded on a note, and in the pleadings the word "note" is used, without words of identification, it will be understood of the note mentioned in the previous pleadings.

IN error, from the circuit court of Adams county; Hon. C. C. Cage, judge.

This was an action brought by William Gaunt against Josiah Grover, Frederick J. Bowie, and Edmund Andrews, on a writing obligatory for $144, dated January 1, 1841, and payable January 1, 1842, to Starkey Gaskins, who assigned it to the plaintiff.

Digitized by Google

The defendants Bowie and Andrews appeared and plead; 1, *nil debet;* 2, "*actio non*, because they say that the said writing obligatory, mentioned in said plaintiff's declaration, was executed by the several obligors thereto, for and in consideration that Starkey Gaskins would hire and deliver a certain negro woman slave to Josiah Grover, on the first day of January, 1841, at the county aforesaid; and the said Starkey Gaskins then and there contracted and agreed with the said Josiah Grover, Frederick J. Bowie, and Edmund Andrews, jointly and severally, and promised, that the said negro woman slave should and would remain in the peaceable and undisturbed possession of said Josiah Grover, from said first day of January, 1841, to the first day of January, 1842, without her the said negro slave woman being sent for, ordered, taken, or kept away from the possession of said Josiah Grover, by said Starkey Gaskins, in, for and during the said last-mentioned space of time, to wit, one year at, to wit, the county aforesaid; and the said defendant, Frederick J. Bowie, avers and says, that the said Starkey Gaskins, on the 3d day of May, 1841, at, to wit, the county aforesaid, did, by his own free will and act, rescind said contract, agreement and promise as aforesaid, and did, on said 3d day of May, 1841, then and there send for, order, take and keep away from the possession of the said Josiah Grover, the said negro woman slave for a long space of time, to wit, from said 3d day of May, 1841, hitherto, at, to wit, the county aforesaid; in consequence of which rescission and breach of contract, and by reason of which said last premises, the said consideration for which said writing obligatory, mentioned in the said plaintiff's declaration, was executed and given, has failed and is wanting; and this they are ready to verify; wherefore, &c."

The plea of *nil debet* was abandoned, and the plaintiff replied to the other plea as follows: *precludi non*, "because he says that at the time of hiring the said negro by the said Gaskins to the said Grover, to wit, on the 26th day of December, A. D. 1840, to wit, at the county aforesaid, it was agreed by and between the said Grover and the said Gaskins, that if the said Gaskins should want the said negro before the first day of Jan-

Digitized by Google

uary, A. D. 1842, he the said Grover should give her up, deducting twelve dollars per month from the note, (meaning that said Grover should be entitled to a deduction of twelve dollars for each and every month, till the expiration of the time for which the said negro was hired;) and the said plaintiff avers that the said Grover had possession of and enjoyed the services of the said negro for a long space of time, to wit, from the 26th day of December, A. D. 1840, till the 3d day of June, A. D. 1841, *without this* that Starkey Gaskins contracted and agreed with the said defendants, Josiah Grover, Frederick J. Bowie, and Edmund Andrews, and promised, as stated in said plea, that the said negro woman slave should and would remain in the peaceable possession of the said Josiah Grover, from the 1st day of January, 1841, to the 1st day of January, 1842, without her (the said negro woman slave) being sent for, ordered, taken or kept away from the possession of the said Josiah Grover by the said Starkey Gaskins, in, for and during the said last-mentioned space of time, to wit, one year, and this he the said plaintiff is ready to verify; wherefore, &c."

To this replication the defendants demurred on three grounds:

1. That it confessed and avoided by new matter the contract of hiring, and the consideration of the writing obligatory, and yet traverses the contract with an *absque hoc*, which is repugnant.

2. That it was uncertain in this, that the deduction of twelve dollars per month was stated to be "*from the note*," without showing what note, when, by whom, and in whose favor made.

3. It admitted the contract of hire, and affirmed in the new matter, that the slave was taken away on the 3d of June, 1841, without traversing the allegation that it was on the 3d of May, 1841.

The court, after argument, overruled the demurrer to the replication, and gave judgment final against Bowie and Andrews for seventy-one dollars sixty cents; and Grover making default, judgment final by default was entered against him for the like sum; from which judgment this writ of error is prosecuted by the defendants, who assign the following errors, viz.:

Digitized by Google

1. In overruling the demurrer to the replication.

2. In rendering judgment final, on overruling the demurrer to the replication.

3. In rendering a separate judgment against Grover.

Sanders and *Price*, for plaintiffs in error.

The plea sets forth the facts of failure of consideration. The replication is not an answer to the matter of the plea, as shown in the abstract. See 1 Chitty's Pl. 648, 649.

The judgment by default against Grover is erroneous in this, that it does not follow the declaration or instrument sued upon. It is for a different sum than that sued for. If the plaintiff had taken judgment for the whole amount, and afterwards entered a *remittitur* to conform with the finding of a jury, had there been one, it might have been tolerated. One reason for this objection is, that this judgment could not be plead in bar to any other suit upon the same instrument, as the judgment without the action or plea of the defendant, is for a different sum than the one set up in the instrument sued upon.

But the whole judgment is erroneous, as it does not follow the note sued upon; this judgment does not come within the provisions of the ninth section of the act published in H. & H. 616. There should have been a writ of inquiry of damages, as provided for in the latter branch of the said ninth section.

For which reason, we insist that the judgment of the circuit court be reversed, and remanded for new proceedings.

William G. Thompson, for defendant in error.

There is some informality, perhaps, in the replications of the plaintiff below, but it is insisted that they are substantially good, and are not demurrable for mere surplusage.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This action was instituted on a writing obligatory. Two of the defendants pleaded specially, that the writing obligatory was given for the hire of a negro woman from the first of January, 1841, for one year, and that it was agreed and promised by the

Digitized by Google

hirer, that she should not be taken out of Grover's possession during the time for which she was hired. The plea avers that she was taken out of his possession by Gaskins, the payee of the writing obligatory, on the 3d of May, 1841. The plaintiff replied by a special traverse, that it was agreed between Gaskins and Grover, at the time of hiring, that if Gaskins should want the negro before the expiration of the year, she was to be given up, and a deduction of twelve dollars per month made from the note, from the time she was so taken until the end of the year. The replication avers that she was in possession of Grover from the 26th of December, 1840, until the 3d day of June, 1841. To this replication the defendants demurred; the court overruled the demurrer, and gave judgment against all the defendants, (Grover having made default) not for the amount of the note, but for seventy-one dollars, being the amount left after deducting twelve dollars per month from the 3d of June to the 1st of January. This we think was error. In actions of debt for a sum certain, and in actions founded on any writing ascertaining the sum due, the clerk is authorized to make the calculation, in certain cases, and to issue execution accordingly. H. & H. Dig. 616. Although this was an action for a sum certain, yet the contract did not ascertain the sum due. That was ascertained only by the replication, which stated a modification of the original contract. For this error the judgment must be reversed; but the question on the defendants' demurrer to the plaintiff's replication, has also been discussed, and as the defendants may desire to obtain leave to take issue when the cause is remanded, we may intimate an opinion that the replication is good. It was framed according to a system of pleading which is now seldom resorted to, denominated a special traverse, being but a qualified or limited denial of the pleading on the other side. It confesses a contract, but denies that it is truly stated in all respects on the other side. Stephen on Pleading, 175. The first cause of demurrer is, that the replication confesses and avoids, and yet traverses the contract with an *absque hoc*. If this were true, it would be a defect, according to this mode of pleading; but the replication does not

Digitized by Google

confess the contract as pleaded; it confesses a contract differing in a material part from that stated in the plea. The second cause of demurrer is, that the replication is uncertain in not stating what note a deduction was to be made from. It must be understood to refer to the note mentioned in all the previous pleadings. The third cause of demurrer is, that the replication avers that the negro was taken away on the third of June, but does not traverse the alleged taking away on the third of May. The time at which the negro was taken away constitutes part of the special traverse, and is therefore sufficient.

The final judgment must be reversed, and the cause remanded for a writ of inquiry.

Digitized by Google

SUTTON BYRD, Administrator of Abednego Porter, *vs.* GEORGE HOLLOWAY, Administrator *de bonis non* of Nancy Porter.

An administrator *de bonis non* can maintain a suit only for those articles which remain unadministered.

If an administrator, upon the settlement of his accounts, is indebted to the estate of his intestate, the creditors or distributees may sue for the balance, the administrator *de bonis non* cannot.

IN error, from the probate court of Franklin county; Hon. James M. Jones, judge.

The record recites, that at the January term, 1842, of the probate court of the county, on application of George Holloway, administrator *de bonis non* of Nancy Porter, deceased, it was ordered that Sutton Byrd, administrator of Abednego Porter, deceased, who was the administrator of said Nancy Porter, be cited to appear at the next term of the court and show cause, if any he could, why he should not pay over the amount due on a final settlement of the accounts of the said Abednego Porter, as administrator aforesaid to said Holloway, administrator *de bonis non* of said Nancy Porter. Citation, issued accordingly, was executed, and at the February term, on the second day of the term, the court made the following decree, viz.: "It is ordered, considered, and adjudged by the court that the said Sutton Byrd, administrator, as aforesaid, pay over to the said George Holloway, administrator *de bonis non*, as aforesaid, the amount due on final settlement of the accounts of said Abednego Porter, as administrator of Nancy Porter, deceased, amounting to $8501 84, after deducting $6155 37½, already paid over.

These proceedings constituted the whole record.

From this decree Byrd prosecuted a writ of error.

Montgomery and *Boyd*, for plaintiff in error.

The proceedings in this case were all defective, both in form

Digitized by Google

and substance. The petition was not in writing, and on its face showed no demand of any particular amount, or any judgment, allowance or decree, establishing any balance remaining in the account of the first administrator. If taken for confessed, and this is the strongest point of view for the petitioner, he was not entitled to any decree for any specific sum. Without a *pro confesso*, he was not, of course, entitled to any decree.

It was also an error in form, to claim anything whatever of Porter's administrator, without an allegation that he had settled the account of his administrator in the probate court. For if the account was settled by Porter himself, in his lifetime, his administrator had no further connection with it. This point was fully discussed and settled in the case of *Kelsey* v. *Smith*, 1 How. 68; also in case *Judge of Probate, use, &c.* v. *Phipps and Wife*. See 6 How. R. 87; 1 Ibid. 87; 5 Ibid. 59. But the substantial error is, that the right and the forum were both misconceived in the petition. The administrator *de bonis non* of Mrs. Porter has no right to the money balance remaining in the account of the first administrator. It was the result of administration, and did not remain in kind. But if such right existed, certainly the claim would not be enforced in the probate court against the administrator, of this administrator. The proper forum would be the circuit court. For it would be like any other claim against the estate of the first administrator, and for which his administrator could be sued at law, and if he had assets, be compelled to pay, and not otherwise. The citation and petition both show, in effect, that Porter settled his administration account before he died. His administrator, then, is in no way liable in the probate court on the subject-matter of that settlement.

If Porter were still living, and had resigned his office after this supposed settlement, he could not be reached in this way. Much less is his administrator liable. 1 How. 93; Rev. Code, 51, § 85.

The principles of this case have been so often settled by this court, that we do not think it necessary to discuss it further.

Digitized by Google

Mr. Justice CLAYTON delivered the opinion of the court.

At the January term, 1842, of the probate court of Franklin county, George Holloway, administrator *de bonis non* of Nancy Porter, deceased, caused a citation to be issued, "requiring Sutton Byrd, administrator of Abednego Porter, deceased, who was administrator of Nancy Porter, deceased, to appear at the next term of the court, and show cause why he should not, as administrator as aforesaid, pay over the amount due on a final settlement of the accounts of said Abednego Porter, deceased, as administrator of Nancy Porter, deceased, to George Holloway, administrator *de bonis non* of said Nancy."

The citation was executed, Byrd made no appearance or defence, and at the February term, 1842, an order was made, directing him to pay over to Holloway the amount due on final settlement of the account of Abednego Porter, deceased, being some twelve hundred dollars. From this order a writ of error was sued out.

It was decided at a very early period by this court, that an administrator *de bonis non* can maintain a suit only for those articles which remain unadministered. *Kelsey* v. *Smith*, 1 How. 67; *Prosser* v. *Yerby*, Ibid. 87. These decisions have not been departed from. They establish the principle, that if the first administrator had made a settlement of his account, and shown an indebtedness upon his part to the estate, the creditors or distributees might sue for this balance, but the administrator *de bonis non* could not. It follows that the order of the probate court, upon the petition of Holloway, was erroneous.

It will be reversed, and the petition dismissed.

Digitized by Google

JOHN HAZLIP et al. Administrator and Administratrix of Joseph Galtney, deceased, *vs.* HACHALIAH H. LEGGETT.

The plea, to an action to recover for services as physician, that the account had not accrued within *three* years, is bad. The limitation of three years does not apply to such a case.

In an action against the maker of a note payable to a bank by the indorsee of the bank, since the statute of 1840 prohibiting assignments by banks, if the maker of the note desire to avail himself of that statute in his defence, he must do so by plea in *abatement;* he cannot do so under the general issue.

In an action by a physician to recover fees due him, it is not necessary that all the items of his account should be strictly proved; where, however, the proof of the various items is not clearly made out, the physician would strengthen his proof by showing that he kept correct books, and that the account was correctly copied from his books.

L., a physician, sued the administrators of G. for medical services rendered, extending from 1836 to 1842, and proved by Dr. M. that he (L.) had attended in the family of G. as physician during his (M.'s) absence, who was G.'s regular physician; that he knew nothing of the particular visits and prescriptions charged, but had seen L. two or three times at the house of G.; that he had heard G. in his lifetime frequently say that in the absence of witness he had employed L.; and he had two or three times been called in consultation with L. at G.'s house, over some of his sick family. *Held,* that the evidence was not sufficient to entitle L. to recover on the account.

IN error, from the Adams circuit court; Hon. C. C. Cage, judge.

Hachaliah H. Leggett sued John Hazlip and Charlotte Galtney, administrator and administratrix of Joseph Galtney, in assumpsit, on a note made by their intestate for one hundred and eighty-four dollars, payable to Elizabeth Fuller, and by her indorsed to the plaintiff, which was credited by $100; also on a note made by Joseph and Robert Galtney, for four hundred dollars, dated November 26, 1839, payable twelve months

Digitized by Google

after date, to the president, directors and company of the Agricultural Bank of Mississippi, or order, at their banking-house at Natchez, and which had been duly indorsed by the cashier, who had authority, by the name of A. P. Merrill, to the plaintiff; and also upon an open account for medical services rendered Galtney, his wife, children and servants during the years from 1836 to 1842, and which amounted in the aggregate to one hundred and forty dollars.

The defendants plead, first, *non assumpsit* by their intestate; second, that the causes of action had not accrued within three years preceding the commencement of the suit.

To this last plea a demurrer was filed and sustained. A jury was empanelled to try the issue, who found a verdict for the plaintiff for six hundred and seventeen dollars and seventy cents.

At the trial the plaintiff proved by John W. Monette, that he knew the plaintiff had attended on the family of Galtney as physician in the absence of the witness, who was Galtney's family physician; he had seen the plaintiff at Galtney's house two or three times, but he did not say at what time. He did not know anything about any of the charges made, nor of the plaintiff's making any visits and prescriptions at the times as charged; he knew nothing of the items; that Galtney was a prompt paymaster, and always settled his accounts when called on; the witness had no account older than one year before the death of Galtney; that he had heard Galtney frequently say that he had employed the plaintiff as his physician when witness was absent; that Galtney's family, white and black, numbered near one hundred persons, and they were often sick; that he had been called two or three times in consultation with the plaintiff at Galtney's house; that the prices charged for the services were according to the usual rates; that Galtney and plaintiff were very intimate, and it was not unusual for men situated as they were to suffer accounts to run on uncollected for a long time.

William Cannon, cashier of the bank, proved that the notice sued on, payable to the bank, was taken up out of the bank on

Digitized by Google

the 11th day of May, 1841; but he did not know by whom the payment was made.

A. P. Merrill, cashier of the same bank, proved that the note referred to had been transferred by the bank, about May, 1840, though the precise time he could not recollect, to Thomas Henderson, as trustee, who owned the note when it was paid, the bank holding it as agent for him; the precise date of the deed of trust to Henderson he did not recollect; when the note was paid, its proceeds were passed to the credit of Henderson.

On this proof the plaintiff asked the court to instruct the jury that possession of a promissory note was *prima facie* evidence of ownership; when the date of an indorsement is uncertain, and not proved, the jury are warranted in presuming that it was done at the date of the note.

"The jury are the judges, from all the circumstances of the case, whether any and what part of an account is proved; and it is not necessary to prove any item by direct and positive testimony, but the same may be established by circumstances."

These instructions were given; and the court, at the instance of the defendants, further instructed the jury that if they believed from the evidence that the note of $400 was assigned by the bank after the 21st of February, 1840, when the law was passed prohibiting such assignments, they must find for the defendants.

The court below refusing to grant a new trial, the defendants prosecute this writ of error.

Dubuisson and *Galtney*, for plaintiffs in error.

There is no law in this state giving to physicians and surgeons rights and privileges which do not equally belong to every other citizen; and physicians' accounts are not more entitled to favor from the laws of the land than any other class of accounts, there being no distinction whatever made in their favor. The 91st sec. of the 43d chap. of How. & Hutch. Digest of the laws of Mississippi is general in its terms and provisions; its language being, "*all actions* of trespass *quare clausum fregit*, &c., and all actions upon *accounts* and upon the

Digitized by Google

case, except actions for slander, and except such actions as concern the trade or merchandise between merchant and merchant, &c., shall be commenced and sued within *six* years next after the cause of such actions shall have accrued, and not after." By sec. 106, same chap. the period of time barring the said several actions enumerated in said 91st sec. except as therein excepted, is changed from six to *three* years. Vide sec. 106, 109 and 110.

The court below erred in refusing to grant a new trial in this case, because the verdict of the jury was manifestly contrary to the authorities cited and the evidence adduced upon the trial thereof. Because the jury wrongfully found on all the accounts sued upon, due within six years next preceding the time of bringing the action, when none of the items contained in those accounts had been proved, and many of them were barred by the statute.

The amount of the note for $400 was also wrongfully included in the verdict of the jury. The facts, presented and relied upon by defendants on the trial in the court below, bring this part of the case within the purview and meaning of the 7th sec. of an act of the legislature of the state of Mississippi, approved February 21st, 1840, which says, "It shall not be lawful for any bank in this state to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was so transferred, the same shall abate upon the plea of the defendant." Both assignments or transfers of said note were proved to have been made after the passage and approval of the act of February, 1840. And whether we regard the assignment by the bank to Thomas Henderson, as trustee for the bank, or the transfer by the bank, as agent for Thomas Henderson, to plaintiff, it is in either case such an assignment as comes within the scope and meaning of the statute, and made in direct violation of its provisions. *Payne* v. *Baldwin*, 3 S. & M. 661.

Digitized by Google

Montgomery and *Boyd*, for defendant in error.

The first question in this case arises on the pleadings. The action is assumpsit on an account for medicines and services as physician, and on a promissory note, &c.

The defendants to the counts on the account pleaded *non assumpsit* within three years, or *actio non accrevit;* and to this plaintiff demurred.

All the laws on limitation of actions will be found in H. & H. 568 – 570. Sec. 9, which is the 4th sec. of the limitation act in the revised code, embraces this action, which may be termed an action on the case. This section was repealed 1827, (see sec. 106, H. & H. 573,) and was again revived in 1828. Sec. 108, H. & H. 573.

The only act of limitation of three years, is an account for goods, wares and merchandise, or articles charged in a store account. Sec. 107, H. & H. 573. It is therefore plain this plea was erroneous.

The next questions arise on the charges of the court.

It can hardly be necessary to say anything in vindication of the charges. They seem to be very obvious. It certainly cannot be questioned at this day that possession of a note is *prima facie* evidence of ownership. And it is equally clear that, for the purposes of justice, a jury may presume a note was indorsed at any time before maturity. The proof as to the time it was indorsed was a little uncertain. Merrill's evidence was quite indefinite. As that fact could not be proved positively, it was but fair the jury should indulge such presumption as would sustain the legality of the transaction, instead of the presumption which would show it illegal. Men are never presumed to violate law; that must be proved.

The last instruction is certainly free from objection. Its application may not be so clear. In other words, the jury may not have exercised proper vigilance in scanning the evidence.

Physicians' accounts are always hard to prove. Nothing but strong circumstantial evidence can commonly be brought to bear. Monette proves such circumstances as would seem to authorize a belief that the account was fair. He proves that Leg-

Digitized by Google

gett was Galtney's physician, and that he met him there on consultation; that the family was sickly, and large, and that the account was moderate. This evidence was certainly such as precludes this court from saying injustice had been done. The defendants below had all the benefit of favorable instructions. The jury did not allow the whole claim; and from all that appears of record, they have done as near right as could be expected.

New trials are never granted in doubtful cases, when the law has been fairly stated to the jury. They are the proper judges of the weight of evidence; and unless it is plain that they have disregarded the evidence, or given undue weight to it, courts never interfere.

Mr. Justice THACHER delivered the opinion of the court.

This was an action of assumpsit upon two promissory notes, and an account for services as physician and surgeon. Plea of *non assumpsit*, and a special plea that the account had not accrued within three years, were filed by the defendants.

A demurrer to the special plea of limitation was properly sustained by the court below. The statutory limitation of three years was not applicable to this case.

It becomes unnecessary to examine the propriety of the charges of the court below to the jury respecting the assignment of one of the notes sued upon in this action. The defence sought to be made by virtue of the statute of 1840, prohibiting the transfer of their bills receivable and evidences of debt, by banks, could not be sustained under the general issue. Such a defence could only be reached by plea in abatement. *Planters Bank* v. *Sharp*, 4 S. & M. 27.

The evidence, however, upon which the jury found for the plaintiff some portion of the account for medical and surgical services, seems extremely vague and uncertain. The only witness called by the plaintiff to establish this account, could speak neither as to the time or the character of the services charged, and, in point of law, gave no testimony as to the account filed. It is true, that it is difficult for accounts of this

Digitized by Google

character to be strictly proved, nor, indeed, is it necessary; but it would seem to be always in the power of a physician or surgeon to show that he was in the habit of keeping correct books of accounts, and that the account sued upon had been correctly copied from his books. It is also true, that this court will not lightly disturb the finding of a jury in cases of this kind, where they are peculiarly the proper judges of the weight of the evidence; but, in the present instance, the evidence does not seem at all to warrant the verdict upon the account.

Judgment reversed, and new trial awarded.

Digitized by Google

JAMES McDUGALD et al. *vs.* THE MISSISSIPPI UNION BANK.

Upon a demurrer to a plea *puis darrein continuance* being sustained, the judgment of the court, under the statute (H. & H. 615, § 8) should be *respondeat ouster*, and not *quod recuperet*.

IN error, from the circuit court of Jasper county; Hon. Van Tromp Crawford, judge.

The Mississippi Union Bank sued James McDugald and two others, upon a note payable to the bank. The defendants plead first, *non assumpsit;* they accompanied this plea with a suggestion that the bank had been, by the governor of the state, proclaimed to have forfeited its charter by the non payment of its notes in specie on presentation; and had also assigned, by a deed of assignment, all its effects, and had thus divested itself of its existence as a corporation. This suggestion, with the proclamation of the governor referred to in it, was spread upon the record.

At a subsequent term of the court, the defendants were allowed to plead two pleas, *puis darrein continuance;* first, of set-off since the commencement of the action; second, that by the deed of assignment the bank had transferred the note in suit to third persons, and had thus assigned all right which they had in the note against the defendants. The attorneys of the bank demurred to the pleas *puis darrein continuance.* The court overruled the demurrer, and rendered a judgment final against the defendants, upon the note sued on, for principal and interest. During the progress of the trial, under the leave to file additional pleas, the defendants filed a plea of usury, which was in the record when the final judgment was pronounced.

The defendants below prosecute this writ of error.

Hughes, for plaintiffs in error.

The judgment of the court should have been *respondeas ous-*

Digitized by Google

ter. The other pleas in the case undisposed of, as *non assumpsit*, were a good bar to the action. *Quod recuperet* was clearly not the proper judgment; for this error, I think the judgment must be reversed.

Mr. Justice THACHER delivered the opinion of the court.

Several pleas were filed by the defendants below in this case. To a plea *puis darrein continuance*, there was filed a demurrer, which was sustained by the court below, but judgment *quod recuperet* ordered. This was error, since the statute, H. & H. 616, § 8, requires a judgment of *respondeat custer*, with a requirement upon defendants to limit their pleadings to the merits of the cause.

Judgment reversed, with directions that the demurrer be sustained, and judgment of *respondeat ouster* be awarded.

Digitized by Google

6s 335
f92 242

JOHN B. PERRY *vs.* WHITWELL S. RANDOLPH.

Where articles of partnership, with reference to a tract of land, were lost, parol evidence of their contents is admissible.

Whatever the private agreements and contracts of persons, who conduct themselves before the world as partners, may be, with reference to debts contracted by them, and the responsibilities of the partners respectively, they will be equally and jointly liable to those dealing with the partnership, for all debts lawfully contracted.

In an action by P. against D. & R. as partners in a race-course, for work done on the course, it was in proof that D. & R. had signed articles to establish, carry on, and complete the race-course, at mutual expense and mutual profits, for five years, at the end of which time R. was to pay D. for half the improvements, and be the sole proprietor; D. to superintend the course and the erection of the improvements; but the articles contained the clause, that "the instrument was not to be so construed as to make the parties partners in the contracting of debts;" D. employed P. to do the work on the course: *Held*, that the clause in the articles of agreement, about the contracting of debts, could not operate to the exoneration of R. from the payment of debts contracted by D. for the purposes of the partnership, and that he would be liable to P. for the value of the work done by him upon the course.

In an action by P. against D. & R. as the owners, in partnership, of a race-course, for work done on the course, R. denied, under oath, the partnership; and, after proof of a written agreement between D. & R. for the construction of the course, at joint expense and profit, P. offered to prove that, though he was employed by D. to do the work, yet that R. was often present, giving orders and directions concerning it, and shared the profits of the course, after it was completed: *Held*, that the proof was admissible, as tending to establish the partnership in the race-course between D. & R., and their joint liability as partners, for the work done.

D. & R. being partners in a race-course, D. sold out his interest to G., who assumed to pay D.'s share of the debts due on account of the course; in an action against D. & R. by P. for work done on the course, *held*, that G. was an incompetent witness to prove payment by D. to P. for the work done by P., and for the value of which he was suing.

IN error, from the circuit court of Marshall county; Hon. James M. Howrey, judge.

Digitized by Google

Perry v. Randolph.

John B. Perry sued Whitwell S. Randolph and Kenneth Dye, as partners, for the sum of sixty-five dollars, for work done by Perry on a race-course, belonging to Randolph and Dye. Randolph plead *non assumpsit*, under oath, and payment. The plaintiff dismissed his suit as to Dye; and upon trial the jury found for the defendant.

From the bill of exceptions, signed on the trial, the history of the case appears to be as follows, viz.:

Gordentia Wait, on the part of the plaintiff, proved that, in the spring of the year 1839, Randolph and Dye came to the office of the witness, Dye having in his hand an article of agreement in writing, between himself and Randolph, to establish a race-track near Holly Springs, on the land of Randolph; the article of agreement was in the usual form of a partnership; Randolph refused to sign the article in its then form, and insisted on having another clause added, which the witness added, when the agreement was signed by both parties, and left with the witness for safekeeping, not to be recorded. That he kept the agreement until the previous term of that court, when he had produced it in court; but he had not seen it since, and did not know where it was. By the consent of the parties the witness stated the contents of the article of agreement, as nearly as he could. It bound the parties to establish a race-track on the land of Randolph; the copartnership was to continue for five years; each party was to bear one half the expense of completing the course, share the profits arising from the track equally, and at the end of the term Randolph was to pay Dye one half of what the improvements were worth; that timber might be used off the land in the completion of the track, and Randolph might sell part of the land, if he could, before the five years had elapsed; that Dye was to superintend the track, the erection of the houses, and have the general care and management of the business. The stipulation added to the agreement was in these words: "This instrument is not to be so construed as to make the parties partners in the contracting of debts."

The plaintiff then offered to prove, by William Arthur, that

Digitized by Google

Dye, in the summer of 1839, employed the plaintiff to work on the race-course, in building the stables, &c., and that Randolph was frequently on the track, ordering and directing the work in which the witness was engaged, under the employment of Dye; and also to prove by the witness, that Randolph shared the profits of the course after the work was done. The court refused to permit the examination, on the ground that Dye and Randolph were tenants in common of the land, and not partners, and the clause in the agreement, prohibiting the parties from contracting debts as partners, discharged Randolph from liability for such debts contracted by Dye; Randolph being liable only for the debts contracted by himself.

The court afterwards permitted the witness to testify as to the work having been done by the plaintiff, and also to a conversation between the plaintiff, Randolph and one William Gift, to whom Dye had sold out his interest in the race-track; in which conversation, while Randolph denied his liability as a partner, yet he expressed his willingness to pay one half the debts due by the race-course, of which the plaintiff's demand was admitted to be one.

This was all the plaintiff's testimony.

The defendant read the deposition of the said William Gift to the jury, the plaintiff's objection to it on the score of his interest in the event of the suit having been overruled. Gift proved that he became the purchaser of one half the tract from Dye, and assumed to pay Dye's debts. At the time of the purchase he was in immediate want of some young men to take charge of the property; that the plaintiff was recommended to him, whom he hired for that purpose. When he hired the plaintiff he loaned the witness two hundred dollars. The witness having agreed to pay Dye's debts, and anxious to secure the plaintiff, asked him what was his situation with reference to Dye; the plaintiff replied that Dye owed him nothing; that the two hundred dollars he had just loaned the witness, was the money which he had received at some of the public gates or stands, and after he received the money he held on to it till the race was over, when he paid to Dye all but his own claim;

Digitized by Google

for he said that it was going to be squally times, and that Dye was a rascal, and he did not consider Randolph bound.

The court instructed the jury, at the instance of the plaintiff, 1. That a partnership may be formed in relation not only to commercial business, but to all other lawful occupations and employments. 2. That there may be also a partnership in some cases touching interest in lands, or in a single tract of land, which will be governed by the ordinary rules applicable to partnerships in trade or commerce. 3. That partners are all bound for articles purchased for the benefit of the firm, though the vendor does not know of the existence of the firm, and though he supposes himself dealing with, and gives credit to, an individual partner, by charging him alone on his book. 4. That if several persons become partners, and agree among themselves that neither shall make any contracts to charge the other, such agreement, between the partners, will not affect strangers having no notice of it. 5. That the rule of law is, he who shares the profits of a partnership is a partner. At the instance of the defendant the court further instructed the jury: "In this case, if Randolph was the owner of the land, and by the contract or agreement it was stipulated that Dye was to have the use and occupation of it jointly with him for five years, or any longer time than one year, for the purpose of using it as a race-track during the time, it was stipulating and contracting for such an interest in land between the parties as should be in writing, signed by the parties, or some one legally authorized for them. If the contract relate to an interest in land within the statute of frauds, then the writing between the parties is, alone, evidence of this contract; and the parties themselves, and also third persons, are bound by its terms, stipulations and conditions."

To this charge the plaintiff excepted, and his motion for a new trial having been overruled, he prosecuted this writ of error.

The following causes of error were assigned:

1. The court erred in excluding that portion of the testimony of the witness, William Arthur, which is set out in plain-

Digitized by Google

tiff's first bill of exceptions, as testimony which he offered to introduce, but was excluded from the jury, on the motion of defendant.

2. The court erred in overruling the objection made by the plaintiff to the deposition of William Gift, offered by the defendant.

3. The court erred in giving to the jury the instruction asked for by the defendant.

4. The court erred in overruling the motion of the plaintiff for a new trial.

Lucas, *Watson*, and *Clapp*, for plaintiff in error.

1st. In support of the error first assigned, it is insisted that, by the testimony of the witness Wait, a partnership in the race-course was established between Randolph and Dye. The written agreement between them was substantially a partnership agreement, and the clause inserted by the witness Wait, at the instance of Randolph, did not change the character of the agreement as to third persons. The law on this subject is stated by the lord chancellor, in the case of *Hamper, ex parte*, (17 Vesey, 412,) in these words: "If a man agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner; and in a question with third persons, no stipulation can protect him from loss." In the case of *Weaver* v. *Tapscott*, 9 Leigh, 424, Parker, J. says: "The reason why the partner taking a part of the profit is liable to creditors, is this: he takes a part of the fund on which they rely for payment." See also *Robinson* v. *Wilkinson*, 3 Price, 538; *Saville* v. *Robinson*, 4 T. R. 720; Watson on Partnerships, 168, 169; *Brown's Executor* v. *Higginbotham & Co.*, 5 Leigh, 583. This last case referred to sets out the doctrine in full.

The partnership in the race-course, between Randolph and Dye, having been established, it was certainly competent for the plaintiff to prove this account by proof that he was employed by Dye to do work and labor for the purposes of the partnership; and that this work and labor he did perform.

Digitized by Google

Now, the testimony excluded went directly to these points. The error committed by the court, in ruling out a portion of the testimony of the witness Arthur, was not cured by that portion of his testimony afterwards admitted, because the testimony admitted was much less full and satisfactory than that excluded.

2d. It is a well-settled rule of evidence, that no person who is directly interested in the event of the suit is a competent witness; and the law looks upon a witness as interested where there is a certain benefit or disadvantage to the witness attending the consequence of the cause one way. 1 Phil. Ev. 55; 2 Starkie, 744; *Jones* v. *Raine*, 4 Rand. 386. In this case the position of the witness Gift was this: he was bound by contract to indemnify Dye against the liabilities which he had incurred on account of the race-course. The plaintiff was asserting by his action a demand of this character against Randolph and Dye; and a demand, which, if established, would, to the extent of a moiety at least, become the debt of the witness, as between himself and Dye; and which, if unsuccessfully prosecuted, would exempt the social assets and the witness from all liability on account of such claim.

Under these circumstances, the witness Gift, at the moment of giving his testimony, had a direct interest in proving that the plaintiff's account had been paid, and thereby defeating the plaintiff's action; because, in that event, he would stand exempted from a liability which would necessarily have been thrown upon him by a verdict against the defendant. See the opinions of Cabell, J. and Tucker, Pres. in the case of *Wilson et al.* v. *Alexander, Sheriff*, 9 Leigh, 459; also 9 Cowan, 128; 2 Marsh. 508.

3d. The instruction given to the jury by the court, on the motion of the defendant's counsel, grossly misstated the law of the case. It was in proof that the partnership agreement between Randolph and Dye was reduced to writing. Proof of the loss of the agreement, and of its contents, placed the case before the jury precisely upon the ground upon which it would have stood had the agreement itself been produced. And had the

Digitized by Google

written agreement itself been in evidence before the jury, the only legal question that could have arisen between the parties on this branch of the subject, would have been as to the effect of the restrictive clause inserted by the witness Wait. The subject-matter of this clause certainly was not within the operation of the statute of frauds; and this clause, it is insisted, was controlled by the well-settled principle, already stated, that an individual cannot form a connection with another, for the purpose of carrying forward any lawful business, upon an agreement to share the profits of such business, without subjecting himself to all the liabilities of such general partnership, whatever may be their agreement and stipulations *inter se.* Watson on Part. 124; 17 Ves. 412; 5 Leigh, 583; Opinions of Parker and Tucker, in 9 Leigh, 427–431.

D. C. Glenn, for defendant in error.

The first clause of the charge objected to is only a reiteration of our statute of frauds. H. & H. 370. The latter is a simple assertion of a principle settled time out of mind, that parol evidence is inadmissible to alter, vary or add to such an agreement. See Rob. on Frauds, 11, note and authorities. The charge was correct in law, and the next question is, did the statute properly apply? Now what case is made out in proof? He proves that he drew up the instrument; that Randolph refused to enter into a partnership; that it was an agreement to establish a race-course on Randolph's land; it was stipulated that Dye should have the use of it for *five years;* should erect buildings and cut timber, and do all other acts of a limited ownership. It was a lease to him for five years of Randolph's land, for which Randolph was to have a part of the proceeds of the tract, and Dye to make his improvements on his own responsibility, and at the end of the term an allowance to be made him for his improvements. This proof clearly shows there was no partnership; but a lease for five years of land, constituting them joint tenants or tenants in common, and, as such, creating an interest in land within the statute of frauds, of course not binding unless in

Digitized by Google

writing. This shows the first charge was proper, and, if so, the second was an inevitable corollary. There was, then, no error in the charges. The next error is the exclusion of Arthur's testimony. Keeping in view the facts above stated, the propriety of so doing is easily seen. The materiality however, is slight. He only proved that Randolph was occasionally at said course, ordering and looking over improvements, *which Dye had employed him to perform*, and that Randolph shared the profits of the course. This was rejected, as attempting, in the face of the written instrument, to fix a contract on Randolph, which he had not expressly sanctioned or authorized. With the instrument before the court this could not have been done.

Mr. Justice THACHER delivered the opinion of the court.

Writ of error to the circuit court of Marshall county.

Perry instituted an action of assumpsit against Randolph and Dye, as copartners, to recover the value of work and labor alleged to have been performed for them. Randolph pleaded that he was not a partner, and also a plea of payment; and the suit having been dismissed as to Dye, a verdict and judgment were rendered for Randolph.

The evidence introduced on the trial below, on the part of the plaintiff, was to the effect that in the year 1839, Randolph and Dye mutually signed articles of agreement, in the usual form of copartnership articles, to establish and carry on a race-course on the land of Randolph for the term of five years, to share the expense of completing the course, to share equally the profits therefrom, and, at the expiration of the term, Randolph was to pay Dye the value of one half the improvements upon the course, and become the sole proprietor. The articles contained the clause that "the instrument was not to be so construed as to make the parties partners in the contracting of debts." Dye was to superintend the course and the erection of the improvements. The articles were not produced upon the trial, but were proved to have been lost. It was also offered to be proved on the behalf of the plaintiff, that although Dye employed him to do the work upon the course, Randolph was fre-

Digitized by Google

quently present and giving orders and directions concerning it; and that Randolph did share the profits arising from the course after its completion. This testimony was ruled out by the circuit court upon the trial.

Although it be true, that all who participate in the profits need not necessarily be considered as partners, in respect to the concern from which the profits arise, yet parties, when no partnership exists, may still have so conducted themselves as to have induced others to give credit under the belief that such a partnership existed. Such cases are impositions by delusive appearances of a copartnership, and the parties are not to be protected by any private agreement of theirs that one shall not be held answerable for the other. The mere circumstance that in the copartnership agreement there is collaterally included a contract in relation to land, does not alter the nature or object of the main agreement, although it may show that as to the land alone, the parties might by the contract have constituted themselves joint tenants, or tenants in common. In other respects, they might still be partners. It is competent, also, to prove the existence of a copartnership by the production of its articles of agreement, if any exist; but where they cannot be produced for any sufficient cause, proof of their contents is admissible, and proof of the conduct of the parties is likewise admissible to show the nature, extent, and terms of the copartnership as it really existed.

The evidence offered was legitimate, for if it did not show the existence of an actual copartnership, it evolved circumstances tending to establish a state of things which had subjected the defendant to the liability of a copartner.

The deposition of William Gift, a witness, was objected to on the ground of his possessing an interest in the result of the suit. The deposition was permitted to be read, and went to show the payment by Dye of the debt sued for in the action. It appeared that Gift had bought out Dye's interest in the race-course, and had made himself liable for his share of the debts of the concern.

There was an issue of payment before the jury, as well as

Digitized by Google

the issue respecting the partnership, and if the latter issue failed for the defendant below, then it was for Gift's interest to show that the account in suit had been settled. This deposition was therefore improperly admitted in evidence.

Judgment reversed, and new trial granted.

CLAYTON, J. gave no opinion, having been counsel.

Digitized by Google

RICHARD J. WILTY *vs.* JOSHUA HIGHTOWER.

It is a general rule that if there be a mere failure of consideration, arising from the sale of a defective legal title, unmingled with fraud or bad faith, the vendee will be left to the covenants and warranty in his deed.

M. W. entered a tract of land, and in January, 1837, assigned the certificate of entry to D. In October, 1838, a judgment was rendered against M. W., under which the land was sold, and bought by H. in September, 1840, who sold by deed of warranty to W., in December, 1840; W. having in 1839 bought the same land from D., to whom a patent issued for it in December, 1841, and who conveyed it by deed to W. in May, 1844; W. filed a bill against H., alleging that H. misrepresented the nature of his title at the time of sale, and that he (W.) had been evicted under a paramount title, and prayed a rescission of the contract of sale from H. to W. H. denied the misrepresentation, and there was no proof of eviction: *Held*, that the sale could not be rescinded, as the complainant had not made out a case of fraud or of plain and palpable mistake affecting the substance of the subject-matter of the contract; and that the bill must be dismissed without prejudice to W.'s remedies at law.

Possession is notice to the purchaser at execution sale of the title of the party in possession; though he have no deed to the property or other title of record.

ON appeal from the vice chancery court at Carrollton; Hon. Henry Dickinson, vice chancellor.

Richard J. Wilty states in his bill that on the 21st of December, 1840, he purchased of Joshua Hightower a tract of land in Choctaw county, for the price of three hundred dollars; for which Hightower on that day executed and delivered to him a deed in fee simple with full covenants of warranty; that Hightower, at or before the purchase, assured him that he had a good title and was fully empowered to sell; that Hightower, in fact, had no title and no right to sell; and that he had abandoned the possession derived under Hightower's deed, and had been evicted in an action of ejectment in the Choctaw circuit court.

Digitized by Google

That Hightower claims title to the land through a sheriff's deed, under a judgment in the Lowndes circuit court, rendered on the 7th October, 1838, in favor of Rugby, Harrison and Blair against Madison Walthall and others; the sale under which, and the sheriff's deed to Hightower, were made on the 21st of September, A. D. 1840. That at the period of the rendition of that judgment none of the defendants therein had any interest in the land; but the same was the property of one John H. Davis, to whom the government of the United States had, on the 12th day of December, A. D. 1841, issued a patent for it. The bill prayed a rescission of the contract, and that Hightower might be compelled to refund and pay back the money he had received from the complainant.

Hightower in his answer admitted the sale, but denied that he had misrepresented his title, or had declared it to be good, or that the complainant had abandoned the possession under his deed or been evicted and called for proof. That Wilty knew all about the nature of the defendant's title, which he admitted he derived from the sheriff's deed, as alleged by Wilty. That Wilty was in possession of the land, claiming it as his own when the sheriff's sale took place; was present at the sale and bid for the land, but the defendant out-bid and became the purchaser. That afterwards Wilty came to the defendant and sought to buy his title, which he sold to him at his urgent solicitation, and at less than the value of the land, and gave the deed as stated in the bill. That Wilty owed Davis for the land, and refused to pay Davis on the ground of the purchase from the defendant. That Wilty had been in possession of the land from prior to the sale to defendant until a recent sale by Wilty to one William R. Aldridge, who was then in possession. The defendant insisted on the validity of the title he had passed to Wilty by his deed.

The proof in the cause was an assignment by title bond on the 18th day of January, 1837, from Madison Walthall to John H. Davis, of the land in controversy; John H. Davis's assignment, by similar bond, to Richard J. Wilty of the same land, dated 19th day of August, 1839; a patent from the United

Digitized by Google

States government, of date December 1, 1841, to Davis, to the land; a deed from Davis and wife to Wilty, dated May 14, 1844, to the same land; the deed from Hightower and wife to Wilty, referred to in the bill; and the deed from the sheriff of Lowndes county to Hightower, also referred to in the bill.

On this state of pleading and proof the chancellor dismissed the bill, and the complainant appealed.

Sheppard, for appellant.

The pleadings show that complainant purchased the land under the impression and belief that the judgment was an incumbrance upon his title.

The sheriff's deed accepted by Hightower, recites that it conveys the title which Walthall had on 9th of October, 1838; but the title deeds, filed in the cause, show that Walthall had sold this land to Davis, January 18, 1837.

Possession of vendee will protect his title against judgment lien, though his bond or deed be not recorded. *Lacoste* v. *Dixon & Stokey*, 1 S. & M. 70.

Wilty was in possession and claiming the land at time of sheriff's sale, under his purchase from Davis, made August 19, 1839. This is admitted by answer. If the judgment had been a lien on the land, it was the duty of Wilty to protect the title of his vendor, and purchase or pay off such incumbrance and deduct the amount so expended from the purchase-money due his vendor.

Davis holds the patent for the land, which relates back to the time of his purchase from Walthall, to cut off *mesne* incumbrances.

The acceptance by Wilty of a deed from Davis in 1844, shows an abandonment of the title derived from Hightower.

The bill charges misrepresentations as to title at and before the sale, and the court will observe that this charge is denied in a qualified manner. The manner of the denial in effect admits that the vendor represented that Davis had obtained his title after the judgment against Walthall.

This misrepresentation will warrant relief; for whether Hightower knew it to be false or was mistaken, he is equally respon-

Digitized by Google

sible, for it operated to deceive and mislead his vendee. The statements of the answer as to the lien are negatived by proof filed. The existence of the judgment lien was a most material fact, for the whole title and right of Hightower hinged on it. Ignorance or mistake of facts material to the contract, and the main and efficient cause of its concoction, will warrant relief in equity. Story's Eq. vol. i. 155, and case cited there to sustain the text.

This case is not within the rule settled in case of *Bumpus* v. *Platner*, Johns. Ch. R. The title could not be tried at law, as both the conflicting claims are vested in Wilty, who is in possession.

The remedy at law on the covenants in the deed would be embarrassed and doubtful, and in such case equity will interfere.

Waul, for appellee.

There was no error in the decree of the vice chancellor.

1. Wilty had possession of the land under a purchase from John H. Davis, and should have been conversant with his own title; and if the title of Hightower was defective, Wilty was conversant with the defects, and could not afterwards avail himself of them. *Williamson* v. *Ranney & Gerault*, 1 Free. Ch. R. 114; *Allen* v. *Hopson*, 1 Ibid. 114.

2. Wilty was himself a bidder at the sale, and induced Hightower to purchase, and could not afterwards set up his title procured or held adverse to Hightower. 1 Bar. & Har. Digest, 564, 567, § 42–67; *Higginbottom* v. *Bennett*, 5 Johns. Ch. R. 184; *Morrison* v. *Law*, 2 Dana, 15; 1 Story's Equity, 375, § 385, n.

3. If he has a remedy, it is clear at law upon the covenants in the deed from Hightower, and he therefore is not entitled to relief in equity. *Bumpus* v. *Platner*, 1 Johns. Ch. R.

Mr. Justice CLAYTON delivered the opinion of the court.

The record shows that Madison Walthall entered a tract of land in the office at Columbus, and in January, 1837, sold it, and assigned the certificate of the register of the land office to

Digitized by Google

John H. Davis. In October, 1838, a judgment was rendered in the circuit court of Lowndes county against Walthall, under which an execution issued, and the land sold to the defendant, Hightower, in September, 1840, who sold to the complainant, Wilty, in December, 1840, and made conveyance by deed, with general warranty. The complainant had previously, in August, 1839, purchased the same land of Davis, the assignee of Walthall. A patent was issued by the government to Davis, in December, 1841, who conveyed by deed to Wilty, in May, 1844.

The bill states that Hightower misrepresented the nature of his title at the time of his sale; that the complainant has been evicted under paramount title, and prays that the contract may be rescinded, the deed cancelled, and Hightower decreed to repay the money with interest. There was no proof of eviction, nor any evidence in the cause, except the several title papers referred to.

It hence appears that the complainant had purchased the land of Davis, and was in possession at the time of the sale by the sheriff to Hightower. All the parties derive their title from Walthall. After the sale by Walthall to Davis, and the purchase and possession of Wilty, Walthall had no interest which could be sold under execution. See *Money* v. *Dorsey*, MS. His only evidence of title at any time was the certificate of the register of the land office; that certificate had been transferred prior to the judgment. Neither he nor Davis had any title upon the records of the probate court of the county in which the land was situated. The possession of Wilty, at the time of the sale under execution, was notice of his title to the judgment creditor, and the purchaser, according to the decision of the majority of this court, in *Dixon & Starkey* v. *Lacoste*, 1 S. & M. 107. It would seem therefore to follow, that at the time of the sheriff's sale, Walthall had no title, and consequently that Hightower got none.

But the title was embarrassed, and in the estimation of the parties involved in doubt. We cannot say that Wilty had not a right to buy his peace, or to purchase up all the conflicting claims. The charge of misrepresentation is denied, and there is

Digitized by Google

no proof of it. The bill alleges an eviction, but there is no testimony to sustain it. Indeed, it is difficult to see how there could have been an eviction, when all the titles and claims were concentrated in the complainant's own hands.

If the agreement in this case had not been executed, and Hightower had filed a bill for specific performance, we might not perhaps have made a decree in his favor. Neither do we think the complainant has made out such a case of *fraud* or of plain and palpable *mistake*, affecting the substance of the subject-matter of the contract, as will justify the rescinding of the contract. It is a general rule, "that if there be a mere failure of consideration, arising from the sale of a defective legal title, unmingled with fraud or bad faith, the vendee will be left to the covenants and warranty in his deed." *Thompson* v. *Jackson*, 3 Rand. 507; *Osgood* v. *Franklin*, 2 Johns. Ch. R. 23. Cases are numerous in which a bill and cross-bill, the one for specific performance, the other for rescission, have been both dismissed, and the parties left to their legal remedies.

A vendor is in general only liable to the extent of his covenants; but there may be such misrepresentation as will give a purchaser a right to relief, to which the covenants do not extend. Nor is an eviction necessary to entitle the complainant to relief in equity, from the consequences of a fraud practised upon him. *Edwards* v. *McLeary et al.* Cooper's Eq. R. 318. But in the case before us, the charge of misrepresentation has not been made out.

We think the decree of the vice chancellor was correct, and affirm it, without prejudice to any legal remedy of the complainant.

Decree affirmed.

Digitized by Google

H. R. W. Hill *vs.* George W. Henderson.

A non resident being sued in a state court, for a sum exceeding five hundred dollars, is entitled, under the act of congress, on the performance of the necessary requirements, to have the suit transferred to the next term of the United States circuit court for the district where he was sued; and on proper application to the state court, it will be error for that court to refuse the transfer.

Nor will it make any difference if such non resident be sued as executor; he will still be entitled, on the proper showing, to the removal of his cause to the United States court.

If the United States court, and the state court wherein such non resident be sued, commence their session on the same day, a fair construction of the act of congress will give the non resident the right to have the transfer made and returned to the next succeeding term of the court.

In error, from the Rankin circuit court; Hon. John H. Rollins, judge.

George W. Henderson, at the May term, 1842, of the circuit court of Madison county, sued Henry R. W. Hill, executor of the last will and testament of Francis Tidwell, deceased, on a note alleged to have been made by Tidwell, for $500. The summons was executed on the 21st of February, 1842; on the 28th of February, the defendant, by attorney, plead *non assumpsit;* on the 5th day of May, A. D. 1842, the defendant moved the court to transfer the suit from that court to the circuit court of the United States for the southern district of Mississippi at Jackson. On this motion, he read the following petition, which was filed on the 28th day of February, 1842, viz.:

"*To the Hon. John H. Rollins, judge, &c.*

"The petition of Henry R. W. Hill, who is a citizen of the state of Louisiana, would respectfully show unto your honor, that George W. Henderson, who is a citizen of the state of Mississippi, by writ issued on the 21st day of February, 1842, commenced a suit against your petitioner, as executor *de son*

Digitized by Google

tort of Francis Tidwell, deceased, on a note for the sum of five hundred dollars, executed by the said Tidwell, dated on the 2d day of November, in the year 1838, payable to Thomas J. Moore, one day after date, and by the said Moore indorsed to the said Henderson. And your petitioner states that the sum in controversy, and the matter in dispute between said Henderson and your petitioner, exceeds the sum of five hundred dollars, exclusive of costs. Your petitioner therefore prays that the said cause may be removed for trial to the next circuit court of the United States of the ninth judicial circuit, to be held on the first Monday in May next, at Jackson, in the southern district of Mississippi, the same being the first circuit court of the United States to be held in the district in which the said suit has been commenced.

"Your petitioner here offers William Yerger and Samuel Yerger as his sureties, who are good and sufficient, that he will, on the first day of the term of the circuit court of the United States aforesaid, enter copies of the proceedings against him as aforesaid, and also that he will then and there appear at said court to defend said cause, which sureties your petitioner prays may be accepted, and no further proceedings had in said cause in this honorable court.

"And as in duty bound your petitioner will ever pray, &c.

H. R. W. HILL."

The court overruled the motion, and refused to transfer the cause.

Hill then asked leave to file an amended petition, setting forth that the then term of the Madison circuit court, which was the return term of the writ against him, commenced its session on the same day with the May term of the United States circuit court for that district, which made it impossible to file the copies in that court, as required by the act of congress; he prayed, therefore, that his petition might be amended so as to insert the "November term" of the circuit court of the United States, in lieu of the May term. The circuit court refused to allow the amendment, and Hill excepted.

Digitized by Google

On the application of Hill, the venue was afterwards changed to Rankin county, where, after a trial, the progress of which it is not deemed necessary to notice, the jury found a verdict for the plaintiff, and judgment was rendered for the sum of $690 83 and costs of suit, to be levied of the goods and chattels which were of the said Tidwell at the time of his death in the hands of the said defendant remaining to be administered, if so much thereof in his hands to be administered he hath; and if so much in his hands to be administered he hath not, then the damages, costs, and charges aforesaid, to be levied of the proper goods and chattels, lands and tenements, of the said Henry R. W. Hill.

From this judgment Hill prosecutes this writ of error.

W. Yerger, for plaintiff in error.

In this case it is contended that the circuit court of Madison county erred in refusing to transfer the suit, upon Hill's petition, to the federal court at Jackson. The writ was returnable to the May term, 1842, of that court, and on the final day of that court, Hill moved to transfer the cause, upon petition filed. This was error. See act of congress, 1 Story's Laws of U. S. 57, § 12; also *Campbell* v. *Wallen's Lessee*, Mar. & Yerg. 266; which expressly decides this point, and answers all the arguments of defendant's counsel.

The judgment is clearly erroneous, being against Hill as executor, &c. of Tidwell; to be levied of his individual goods, if he has none of Tidwell's in his hands. See H. & H. 396; 2 How. R. 617; 7 Ibid. 125.

Tarpley, on the same side.

Handy, for defendant in error.

1. The refusal of the court below to remove the cause to the circuit court of the United States cannot be assigned for error here, because, 1st. It does not appear by the bill of exceptions for what reasons that court refused the application for removal. It might have been for the reason that the court was not satis-

Digitized by Google

fied that the amount in controversy exceeded the sum of five hundred dollars, exclusive of costs; a matter left entirely to the judgment of the court below, by the act of congress; or it might have been, that the sureties required by the act of congress were not actually offered to the court, when the application for removal was made. In the absence of all facts, this court must presume that the court below acted correctly. 2d. The motion for removal was made in the Madison circuit court, and overruled; afterwards the defendant below moved for a change of *venue*, and caused the case to be removed to the circuit court of Rankin county, where it was tried upon its merits and determined. He has thereby waived his right of exception to the action of the court on the first motion. His remedy, if he complained of the overruling, was by mandamus, obtained either from the federal court, or from this court, to compel the removal from the circuit court of Madison county to the U. S. circuit court. 1 Cooke, 160; 4 Hen. & Munf. 173, cited in Conk. Tr. 87. Instead of pursuing this course, and standing upon his rights there, he elected to abide by the jurisdiction of the state court, and of his own motion caused the case to be adjudicated in the state court; and after the removal to the Rankin circuit court, he filed the plea of *ne unques executor*, which presented the only issue in the case, and thereby fully acquiesced in the jurisdiction of the state court. He now asks this court to reverse the final judgment of that court, which, so far as this assignment of error goes, is without error, because the circuit court of Madison county erred in refusing the removal, which was a matter purely incidental, and waived by the defendant's own motion. Suppose this court reverse the judgment for this reason; is it not too late for the defendant below to remove the case from the state court? He has already removed it to another court, which would place it out of the provisions of the act of congress. But even if the removal could take place, the merits of the case have been fully and fairly determined, and the presumption is, that the result in the federal court would be the same as that in the state court; and by causing the case to be tried again, this court would be doing a useless and idle act.

Digitized by Google

2. As to the form of the judgment. The action was against the plaintiff in error as executor *de son tort*, to which the only plea was *ne unques executor*, the plea of *non assumpsit* being struck out. Upon this issue, the verdict was for the plaintiff below, and the judgment was *de bonis testatoris si; et si non, de bonis propriis.* This is the proper judgment in such case. 1 Saund. R. 336, b. note 10, near the conclusion of the note; 2 Will. on Ex. 1409, (2d Am. ed.); 7 Cow. 64. Although the declaration is against Hill as executor generally, (which is the proper form, Com. Dig. tit. Administrator, C. 3) yet the indorsement on the writ shows that he was charged as executor *de son tort.*

Mr. Chief Justice SHARKEY delivered the opinion of the court.

Hill was sued as executor of Tidwell on a promissory note for $500, made by the deceased in his lifetime. At the return term, he pleaded *non assumpsit*, and presented to the court a petition for the transfer of the cause to the circuit court of the United States. In the petition, he states that he is a citizen of Louisiana, and that the plaintiff Henderson is a citizen of this state; that the sum in controversy exceeds $500, and prayed that the cause might be transferred. He offered surety, as required by the act of congress, for his compliance with the conditions of the law. The refusal to transfer the cause is one of the errors assigned. An objection was also taken to the form of the judgment, it being against the goods and chattels of the testator, if to be had, but if not, then against the proper goods of Hill. The judgment was probably so entered because the suit was against Hill as executor *de son tort*, or at least it was in that capacity that a recovery was sought.

The act of congress is explicit, that if suit be commenced in a state court by a citizen of the state in which the suit is brought, against a citizen of another state, for a sum exceeding $500 exclusive of costs, to be made to appear by sufficient showing to the court, and the defendant shall, at the time of entering his appearance, file a petition for the removal of the cause into the next circuit court to be held in the district where the suit is

Digitized by Google

pending, and offer good surety for his entering in such court, on the first day of its session, copies of the process against him, and also for his there appearing, and entering special bail if it be necessary; it shall then be the duty of the state court to accept the surety, and proceed no further in the cause; and the copies being entered, the cause proceeds in the United States court, as though it had there been commenced. On a careful examination of the petition, we are unable to perceive even a technical ground for its refusal. It seems to comply with the act of congress in every particular. It contains all the statements prescribed, and was offered at the return term, or indeed before, as it was filed a few days after the service of process, Hill having previously entered his appearance. But whether the filing was a sufficient presentation or not, is not material, since it was presented to the court at the return term. The amount in controversy was manifest from the papers in the cause. The terms of both courts commenced on the same day, hence it was impossible for Hill to file his papers at that term of the United States court. But that, in truth, was not the next term. If the two courts happen to be in session at the same time, a fair construction of the act of congress entitles the party to have the transfer made and returned to the next succeeding term. Nor was the circumstance that Hill was sued as executor, entitled to any weight. The suit was brought with the view of charging him as executor *de son tort*. A citizen of one state may be executor in another, and, as such, he will be amenable to the jurisdiction of the probate court; but the courts of the United States have jurisdiction in the case of executors or administrators, even though the court might not have had jurisdiction as to the testator or intestate. *Childress* v. *Emory*, 8 Wheat. R. 642. As the act is imperative that the court shall proceed no further, it was error to do so; the party having made out a clear right to a transfer of the cause, the authority of the state court ceased. It is error in a court to proceed to judgment when the law declares it shall not. A mandamus is not the proper remedy. This identical question was so decided in Tennessee, after an elaborate argument, and we think correctly.

Digitized by Google

Mar. & Yerg. R. 266. It was there insisted that the aggrieved party must resort to a mandamus, but the court decided otherwise.

For this error the judgment must be reversed, and the cause remanded, with directions that it be transferred to the circuit court of the United States, on the plaintiff entering into the required bond with sufficient surety.

Digitized by Google

A. H. BUCKELS et al. *vs.* H. W. CUNNINGHAM et al.

The administrators of a deceased person, at the sale of his personal property, proclaimed that the slaves about to be sold were subject to judgment liens, and offered and agreed that, in case they should be seized under the judgments, the sale should be considered as void and the notes of the purchaser be given up; the slaves accordingly sold for their full value; in an action brought by the administrators on a note given for the purchase-money, *held* that the makers of the note might show, under the general issue, that the slaves for the price of which the note was given were taken out of their possession and sold by judgments against the estate, and that the consideration of the note had thus failed.

The rule of law that parol testimony cannot be heard to vary written agreements, has never been carried so far as to defeat the right to prove a failure of consideration.

IN error, from the Jefferson circuit court; Hon. C. C. Cage, judge.

Hugh W. Cunningham, and James M. Lazams, in right of his wife, late Sarah May, and his said wife, filed their declaration in assumspit to the May term, 1843, of the Jefferson circuit court, against Abraham H. Buckels and William D. Buckels, upon their joint and several promissory note for $825, dated January 18, 1840, and payable nine months after date to H. W. Cunningham and Sarah May, administrators of estate of David May. The declaration was in the usual form, and contained the common money counts. The defendants pleaded *non assumpsit* to the declaration, and a special plea to the first count. The special plea alleged that the note in said first count mentioned, was made by defendants to Cunningham and Sarah May, as administrator and administratrix of David May, deceased, to secure the payment of the purchase-money of a negro slave named Maria and her child, purchased by defendants at administrators' sale from the said plaintiffs, Hugh and Mary, administrator and administratrix, as aforesaid. That

Digitized by Google

upon said sale and the giving of said note, it was agreed by the said Hugh and Mary, that in case said slaves should be taken from the possession of the defendants, and sold under and by virtue of execution upon any judgment before then rendered and unsatisfied against David May, that said note should be null and void; and defendants aver that said slaves afterwards, and before the commencement of the suit, were taken from the possession of defendants by virtue of a writ of execution upon a judgment rendered before said sale against the said David May, which judgment was a lien upon said slaves, and under and to satisfy which, said slaves were sold. Defendants then averred that there had been a total failure of the consideration of said promissory note, and concluded with a verification.

The replication to the special plea avers that the consideration for which the said promissory note was given has not failed, in manner and form and for the reasons in said plea mentioned and set forth.

Upon the trial of the cause, the defendants offered in evidence to the jury a regularly certified record from the United States circuit court for the southern district of Mississippi, of the judgment and proceedings in that court in the case of George W. Tyson & Co. against Sarah May, administratrix, and Hugh W. Cunningham, administrator of David May, deceased; which record shows, that, at the November term, A. D. 1839, of said court, the said George W. Tyson & Co. recovered judgment against the said Sarah May, as administratrix, and Hugh W. Cunningham, as administrator, of David May, upon two promissory notes executed by the said David May in his lifetime, for the sum of $2525 78. That a writ of *fieri facias* was issued upon said judgment, returnable to the May term, 1840, of said court, which was levied by the marshal upon several negro slaves, and among them, upon Maria and her two children, which writ of execution was returned without a sale having been made. That a *venditioni exponas* was the nissued, returnable to the November term, 1840, of said court, for the sale of said slaves, upon which the marshal returned that he had, on the 6th July, 1840, sold said negro slaves, including Maria and

Digitized by Google

her two children, at public sale, &c. And that an *alias fi. fa.* was issued, returnable to the May term, 1841, for the balance remaining due upon said judgment, which was returned, no property found.

This record was ruled out by the court, and not allowed to be read in evidence to the jury.

The defendants then offered A. H. Buckels, the father of the defendants, as a witness, and offered to prove by him, that the note sued on was given by defendants to the plaintiffs, Sarah and Hugh, for the purchase of two negro slaves, to wit, Maria and her child, bought by defendants of the said Sarah and Hugh, administratrix and administrator of David May, at a public sale made by them of the estate of David May. That at said sale it was announced that said slaves were subject to the lien of sundry judgments, and amongst others, to the judgment of George W. Tyson & Co. aforesaid. That at said sale, the said Sarah and Hugh announced and agreed, as part of the terms of said sale, that in case said slaves should be levied on by virtue of said judgment, or any other to which they were subject, that then and in that case the sale should be null and void, and the notes given for the purchase-money should be cancelled and returned. That said slaves were purchased by defendants upon these terms and under this argreement. That said slaves were subsequently, and before the commencement of this suit, levied upon by the marshal, and taken out of the possession of the defendants by virtue of the *fieri facias* set out in the record aforesaid; and that Maria and child are two of the slaves mentioned in the marshal's return upon said *fi. fa.* and subsequently sold by him under the *venditioni exponas.*

This testimony was also ruled out by the court; to which decision of the court, ruling out the record and evidence aforesaid, the defendants' counsel excepted at the proper time. The case was then submitted to a jury, who returned a verdict for the plaintiffs. At a subsequent day of the term, a motion was made by defendants for a new trial, on the ground that the court improperly ruled out legal evidence offered by defendants, and refused to allow the same to go to the jury, which motion was overruled, to which the defendants also excepted.

Digitized by Google

The defendants in the court below have brought the case up by writ of error.

John B. Coleman, for plaintiffs in error.

1. That a failure of title to property purchased at administrators' sale may be set up in bar of the recovery of the purchase-money, has been settled by this court in *Campbell* v. *Brown*, 6 How. 230; *Puckett* v. *McDonald*, Ibid. 269; and this, too, in cases of a sale of land from which the purchaser has never been evicted. In the case at bar, the purchaser has not even a naked possession, the property for which the note was given having been taken out of his possession and sold by the marshal.

In answer to the objection, that the transcript of the judgment of the federal court offered in evidence did not sustain the allegations of the special plea, it is sufficient to reply that the general issue was also pleaded; and that evidence of a failure of consideration was admissible under it. 1 Raymd. 87; 1 Salk. 344; Carth. 356; 1 Chitty 470.

2. The testimony rejected by the court was competent for the purpose of showing the actual contract of sale — the terms and stipulations under which the vendors sold, and the purchasers bought. The property was offered for sale by the administrators, and purchased by Buckels, with the understanding that there were liens upon it, and the express agreement that if it were taken by virtue of any of these liens or incumbrances, the note executed for the purchase-money should be null and void, and should be cancelled and delivered up.

Evidence, then, of the contract of sale and purchase, showing that by its very terms, the purchaser was under no liability to the vendor, was surely admissible in defence of an action brought by the vendor against the purchaser for the recovery of the purchase-money.

While it may be admitted, for all the purposes of the case at bar, that in sales by administrators and trustees there is usually no *implied* warranty of title, it is nevertheless well settled that where they do expressly warrant the title, and thereby induce

Digitized by Google

purchasers to buy, the purchasers can avail themselves of a failure of title as a defence to the collection of the purchase-money; 2 Harr. & Gill, 176; Chitty on Contracts, 133, note (†.)

3. The testimony rejected by the court was also competent for the purpose of showing that a fraud had been practised upon the defendants at the time of the sale, by the administrators.

It was known to all the by-standers, and was admitted by the administrators, that the negroes were subject to the liens of various judgments, and liable to be levied on at any moment. The inevitable consequence would have been, that had the property been sold without any stipulation against these incumbrances, it would have brought nothing. To induce persons to purchase, the administrators stipulate, as a condition and part of the terms of the sale, that if any of the property is taken from the purchasers by any of these judgments, their notes given for the purchase-money shall be cancelled. The effect of this agreement is visible in the prices at which the property was sold. It brought its full value. Maria and her child, an infant, not named, sold for $825. Would any man in his senses have agreed to give such a price for a woman and child which were liable to probably a dozen of judgments? The full value of the negroes was bid, because the purchasers relied upon the agreement of the administrators, and supposed that they would comply with it in all honesty and good faith.

James H. Maury, for defendants in error.

1. If the rule of evidence which requires a correspondence between proof and allegation has any application to pleas, the decision of the court, in ruling out the record offered under the special plea, was right. The allegation of a judgment against May could not be proved by the record of a recovery against his administrators. 1 Starkie, 370-413.

2. The evidence of the witness, so far as it was intended to establish the seizure and sale of the property, was properly ruled out by the court; for a judicial sale can be proven only by the writ, or an authentic copy; and cannot be proven by parol

Digitized by Google

evidence. 1 Phil. Ev. by C. & H. 218, 219, note by Cowen & Hill, part 1, p. 542–544.

The witness was also incompetent to prove a verbal agreement, or any understanding between the parties not expressed in the note. Where parties have used the precaution to ascertain the terms of their contract by a written instrument, the law will not subject them to the uncertainty of parol evidence; which is therefore inadmissible for the purpose of enlarging, restraining, or varying the terms of a written contract. 1 Phil. Ev. 555, note by Cowen & Hill, 1460, where is cited 17 Wend. 190; 1 Cowen, 249; 14 Mass. 154; 4 Litt. 166.

3. The stipulations which the proof was intended to connect with the sale of the property, were such as neither he nor the administrators had a right to make. The powers of an administrator are derived from the law and the probate court; and he is authorized by neither to embarrass the estate with covenants and stipulations that might result in its ruin. 2 How. R. 609; Chitty on Contracts, 84; 1 T. R. 489; Coxe's Digest, 14, citing 1 Gallison, 37. A warranty of title made by an executor would not bind the estate.

J. F. Foute, on same side.

There is no rule of law better settled, than that one which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement. *Renner* v. *Bank of Columbia*, 9 Wheat. 581; *Randall* v. *Phillips and others*, 3 Mason, 378.

And all the evidence offered by the defendants below (the appellants) in the circuit court, is of the proscribed and inadmissible character above referred to.

But the record offered by defendants was also clearly inadmissible, for the reason that that suit was *res inter alios acta*. See *Baring and others* v. *Fanning and Coles*, 1 Paine's R. 549; *Hurst's Lessee* v. *McNeil*, 1 Wash. Cir. Ct. R. 70; *Lessee of James* v. *Stockey*, Ibid. 330; *Payne* v. *Coles*, 1 Munf. 373; *Chapman* v. *Chapman*, Ibid. 398. The motion for new tria was made on the ground of the alleged errors by the court in

Digitized by Google

excluding the record and witness's testimony, offered by the defendants, and no other ground was laid; and it being clear, we think, from the rules and authorities above referred to, that the circuit court did properly exclude that evidence, there could be no error in refusing the new trial.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

It seems that the note on which this suit was brought was given for two slaves, purchased by the plaintiffs in error, at a sale made by the defendants in error, as the administrators of May. At the time of sale it was proclaimed that the slaves were subject to judgment liens, and the administrators offered and agreed that in case they should be seized under the judgments, then the sale should be considered as void, and the notes of the purchaser given up. With this understanding the sale proceeded, and the slaves brought their full value.

The defendants below pleaded *non assumpsit*, and a special plea, that the negroes had been seized and sold under a judgment rendered in the United States court against May, the intestate, in his lifetime, whereby the consideration had failed. Issue was taken, and on the trial the defendants offered in evidence a judgment rendered prior to the sale, against Cunningham and Mrs. May, as administrator and administratrix, since the death of May. This was properly ruled out under the special plea, as it did not agree with the allegation therein, that the negroes were seized by the marshal, under an execution on a judgment rendered against May in his lifetime.

The defendants then offered a witness to prove what had transpired at the sale, and that the consideration of the note had failed by a sale of the negroes under judgments; but this testimony was also ruled out, and the defendants excepted. They also applied for a new trial, and excepted to the overruling of their motion.

These two questions are presented: Did the agreement of the administrators, made at the time of sale, before the property was struck off, constitute a good defence to the action? And if so, was it admissible under the general issue? We do not

Digitized by Google

hesitate in giving an affirmative answer to both these questions. If the property was sold under execution for a debt of the estate, then the estate is not prejudiced by admitting the defence, for it has already received the benefit of the property. That an administrator may bind himself personally, in a sale of property, either real or personal, by a covenant framed for that purpose, cannot be questioned. This point was settled in the case of *Sumner* v. *Williams*, 8 Mass. R. 162, and the rule applied to this case decides it. The administrators, when they made the sale, agreed that if the property should be sold under the judgment liens, the existence of which they admitted, then the sale should be rescinded, and the notes of the purchaser delivered up. This agreement constituted part of the terms of sale; it was a verbal covenant, as binding on them as though it had been given in writing. Let us suppose they had made a written covenant to that effect; they would have been bound on it for damages in an action on the covenant. An administrator has such an interest coupled with his power, as to make his contracts binding. If the purchaser could have maintained an action for the breach of such a covenant, his defence to an executory contract may be placed upon the same footing, on the verbal agreement of the administrator, as he must be supposed to have agreed to give the value of the property only on the strength of the agreement. This is especially the case when the parties sue, not as administrators, but as individuals in their own right, as they have done in this instance. A failure of consideration is shown, in connection with their promise that on the happening of such an event the notes should be delivered up. The contingency had occurred which it was agreed should put an end to the contract; it therefore extinguished all liability. Of course such a defence is proper under the general issue; and the judgment, and the levy and sale under it, constituted proper evidence to support the defence under this plea.

But it is urged that as the defendants below had given a note, they could not, by parol testimony, vary the written agreement. This rule of law has never been carried so far as to

Digitized by Google

defeat the right to prove a failure of consideration. In such cases it has no application. We think, therefore, that the evidence was improperly ruled out, for which error the judgment must be reversed, and the cause remanded.

Digitized by Google

Pharaoh Carter *vs.* Peter G. Taylor et als.

C., being sued upon three notes made by an agent, plead *non assumpsit*, with an affidavit of its truth, and that the notes were not made by him. The plaintiff, on the trial, read a power of attorney from C. to the agent, authorizing him to purchase goods for C. to keep up a mercantile establishment owned by C. either for cash or on a credit, and to execute the notes of C. for that purpose. After the introduction of the power of attorney, the plaintiff, without other proof of the execution of the notes sued on, read them *without objection* on the part of the defendant to the jury. *Held*, that by permitting the notes to be thus read without objection, the defendant waived further proof of their due execution, and could not, on motion for a new trial, or in this court, object to a verdict against him on the ground that the notes had been improperly admitted in evidence.

It is requisite, before a principal can be held bound by the acts of his limited agent, not only to prove the agency, but also to prove that the act done was within the scope of that limited agency; thus where, in an action against a principal on a note made by his agent, it is proved that the agent was authorized to execute the notes of his principal in the purchase of goods for the store of the principal, it must also be proved, before the principal will be liable, that the notes were actually executed in the purchase of such goods.

And if, in an action on such notes, the defendant, on proof of the execution of the power of attorney, permit the notes, without objection, to be read in evidence to the jury, it will be a tacit admission on his part that the notes were duly executed by the agent in the proper purchase of merchandise; and he will not be heard in a motion for a new trial, or in this court, objecting that such proof was not made, and that the notes were therefore inadmissible in evidence.

In error, from the Adams circuit court; Hon. Charles C. Cage, judge.

Peter G. Taylor, Henry B. Dearth, and Hiram Hartt, partners under the firm of Taylor, Hartt & Co., brought their action of assumpsit against Pharaoh Carter, upon three promissory notes; one dated at New Orleans, September 4th, 1841,

Digitized by Google

for $794 56, payable five months after date; one dated Natchez, 16th April, 1842, for $408 63, payable one day after date; and the other dated Natchez, July 5th, 1842, for $794, payable four months after date, each payable to the said Taylor, Hartt & Co., at places in New Orleans, with ten per cent. interest from date or maturity, and each signed "P. Carter, per G. H. Lyons."

To this action Carter appeared and filed the plea of *non assumpsit* in the usual form, which plea was verified by oath, to the effect that the plea was true, and that he had not made the notes sued on.

A jury was empanelled, and on the trial of the issue the plaintiffs read a power of attorney from Carter to the said G. H. Lyons, constituting him his attorney, "for me and in my name and for my use, as agent and manager for me, to take possession of all my stock of goods now on hand in the city of Natchez, in said county and state, lately purchased by me of T. A. S. Doniphan, of said city, for the purpose of selling and disposing of the same by retail, for cash or on a credit, as he the said Guthridge H. Lyons may think proper and most advantageous to my interest; and upon receiving payment of all debts due by said sales of goods, to receipt and give acquittance in my name for the same, and to employ clerks, bookkeepers or salesmen, if necessary, for me and in my name, the same as I could do if personally present. And the said Guthridge H. Lyons is furthermore in my place and stead put and deputed, constituted and appointed my lawful attorney, for me and in my name and for my use to contract for and purchase goods, wares and merchandise with money arising from the sales of the said goods now on hand, as aforesaid, or on a credit for any length of time that he may obtain the same from any person or persons in any city within the United States, in order to replenish the said stock of goods now on hand as aforesaid, so soon after the delivery of these presents as he the said Guthridge H. Lyons shall think best to supply and replenish the same; and at any time hereafter that the said Lyons may deem it necessary, to make further purchases in order at all times to keep a sufficient supply of goods, wares and merchandise on hand in the said store at

Digitized by Google

said city of Natchez; and in the purchases of said goods, wares and merchandise as aforesaid from any person or persons as aforesaid, to sign my name to any and all promissory notes or obligations for the payment of the same, at any time and place that he, the said Lyons, may contract and agree for the payment thereof, and thereby binding me for the payment of said promissory notes or obligations in any amount as aforesaid, the same as if I had been personally present and had signed the same myself. In witness, &c." This power bears date the 4th day of September, 1840.

The plaintiffs then read the notes before described, and introduced a witness who swore "that the said Guthridge H. Lyons had on one occasion, some year or two since, informed him that he had purchased goods from the said plaintiffs." This was all the evidence in the cause; upon which the jury returned their verdict in favor of the plaintiffs, and assessed his damages to the sum of $2547 33.

The defendant moved the court for a new trial, on the ground that the verdict of the jury was contrary to law and evidence; which motion was overruled by the court, and Carter filed his bill of exceptions to and prosecuted this writ of error.

Sanders and *Price*, for plaintiff in error.

The error mainly relied upon by the plaintiff in this court is the refusal of the judge in the court below to grant a new trial.

First, because, upon the plea of *non est factum*, or *non assumpsit* upon oath, the onus or proof of the execution of the notes lies upon the plaintiffs in the action on the trial of the issue before the jury. This was not done, for no one proved the signature of either Carter or his supposed attorney Lyons to either of the notes. Secondly, that the proof before the jury was insufficient to authorize the verdict, were it conceded that the note was, in point of fact, executed by said Lyons, because it is not shown that they were given "for goods, wares or merchandise to replenish the stock of goods on hand of the plaintiff," or "to supply or replenish the same," or to "keep up a sufficient supply

Digitized by Google

of the same in the store of the plaintiff in error at Natchez," beyond which he, the said Lyons, had no power to bind the plaintiff in error. Thirdly, because the letter of attorney read does not authorize or empower the said Lyons to contract for interest at any rate, particularly at an illegal one. Two of the notes were made at Natchez, without pretext for being for loan of money; and were they in every other respect binding upon the plaintiff, would not be allowed under the plea to carry interest, which was obviously computed by the jury.

The following authorities are relied upon: "Acts done by an agent, within the scope of his authority, and in which his commission is punctually pursued, are of course binding upon the principal; but where the authority is particular, (as we assert was the authority from Carter to Lyons,) the party must pursue it; and if the act vary from it, he departs from his authority, and what he does is void, unless the variance be merely circumstantial. Paley on Agency, 150.

The court is also referred to its own decision in the case of the *Planters Bank* v. *John Cameron et al.* 3 S. & M. 609, where it is held, "In case of a special agent, who is one constituted for a particular purpose, and under a limited authority, his principal is not bound if he exceed his authority." Also in the case of *Fox* v. *Fisk*, 6 How. 345, it is held, "The principle of law is a familiar one, that an agent cannot bind his principal beyond the extent of his authority; and the law is even more rigid in circumscribing a special agent; any act exceeding the special and limited authority is a nullity;" in which the court cites Story on Agency, 126.

From all which we contend that the circuit court erred in refusing to grant a new trial, and in rendering said judgment, &c.; and that said cause ought to be reversed and remanded for a new trial, or that this court render a judgment in bar of said action, &c.

Thomas Reed, for defendants in error.

1. It was not necessary to prove that the signature to the notes was made by Lyons, but only that he was authorized to

Digitized by Google

execute them in the name of his principal, Carter. The notes were evidence that they were properly executed. By looking into the record, it will be seen that all the notes were made and signed by Lyons for Carter. The plea of *non est factum* was good, so far as denying that Carter in his own handwriting did not execute the notes; but when the plaintiffs introduced the power of attorney, and proved that Lyons, the agent of Carter, had purchased goods of the plaintiff, that raised the presumption that these notes were executed by Lyons for the purchase of the said goods; and this must be rebutted by evidence, or the jury were authorized to find a verdict for the plaintiffs.

The other view, that the plea denied the signature of Lyons, is not tenable, because Carter could not be permitted to file a plea to that effect. Lyons himself is the only person that could make denial of his signature to the notes. This plea, then, only put in issue the right of Lyons to execute this note in the name of his principal, Carter. And certainly, from the evidence, Lyons was fully empowered with that authority.

2. In answer to the second ground alleged as a sufficient cause for a reversal, we only say that having proved that Lyons, the agent of Carter, about the time of the date of these notes, purchased goods of the plaintiffs, it was enough to authorize the verdict of the jury; they at least thought so; and this court will not disturb it on that ground.

But there is another answer to this assignment; it was unnecessary for the plaintiffs to prove that goods were purchased. On presenting the evidence of authority to make this kind of a contract, they could have rested their case, and it would have been sufficient testimony to demand a verdict for them.

3. Another point is made, that has been raised for the first time in this court, and it presents itself in two forms or parts:

First, that we recovered ten per cent. interest upon the notes. That may be so, but it is certainly too late for the plaintiff in error to make this objection; it should have been taken advantage of at the trial.

Second, that the agent Lyons was not authorized to contract for interest. This was an incidental right, that follows upon

Digitized by Google

the power to make contracts, purchase on time, &c. The agent is fully authorized to buy goods on time; and in order to do so, he was compelled to pay interest for the indulgence.

The counsel for the plaintiff in error, in his brief, relies upon the following authorities: Paley on Agency, 120; Story on Agency, 126; 6 How. 345; 3 S. & M. 609. We will adopt the same authorities, and rely confidently on their sustaining our positions; and will therefore ask an affirmance of the judgment.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The plaintiff in error was sued on three promissory notes, made by an agent. He plead the general issue, and filed an affidavit of the truth, and that the notes were not made by him. G. H. Lyons signed the notes as attorney in fact for Carter. On the trial, the plaintiffs' counsel read a power of attorney executed by Carter, by which Lyons was authorized to purchase goods to keep up a mercantile establishment owned by Carter in the city of Natchez, either for cash or on a credit, and was also authorized to make notes for that purpose. After having read the power of attorney, the notes were introduced and read by the plaintiffs' counsel, without any proof of their execution; but it does not appear that the defendant's counsel objected. The affidavit was sufficient to put the plaintiffs on proof of the making of the notes, but by permitting them to be read without objection, the defendant waived the necessity of such proof. Some of the authorities go so far as to decide that even a general objection to the admissibility of evidence will not do; the party objecting must point out the ground of objection. But clearly, if evidence be admitted without any objection, it is too late to take exception to it on an application for a new trial, or to say in the appellate court that it was improperly admitted. *Jackson, ex dem. Dox* v. *Jackson*, 5 Cowen, 173; *White* v. *Kibbing*, 11 Johnson, 128.

Another objection is, that there was no proof that the notes were given on the purchase of merchandise to keep up the mercantile establishment, that being the only purpose for which

Digitized by Google

Lyons was authorized to bind his principal. As a general rule, when a party is to be charged by the acts of his agent, the authority, if it be in writing, ought to be produced, so that it may be seen whether the thing done was authorized, and whether the authority has not been transcended. The plaintiff in error was sued on notes made by an agent. By the letter of attorney the power was given to make notes for merchandise to keep up a mercantile establishment. This was a general authority in regard to a particular business. The principal was bound by every note made by the agent for the given purpose, but he was not bound to pay notes made in his name for other purposes. The legal validity of the notes, as the notes of Carter, was put in issue by the pleadings. They were not his notes unless made within the scope of the agent's power, and it was incumbent on the plaintiffs below to show that they were given for merchandise to keep up the mercantile establishment. It was not sufficient to show that the agent had authority to make notes for a particular purpose, without also showing that these notes were given in the course of that business. He who seeks to make the principal liable for the act of his agent, must not only prove the agency, but must also prove, if it be a limited agency, that the transaction was within the scope of the power, as on that depends the legal liability of the principal, unless such proof be dispensed with by the pleadings. Without such proof, the notes were not evidence of liability, and of course were inadmissible; or, having been admitted without the preliminary proof, the jury might have been instructed to disregard them. Here again the defendant was at fault. No objection whatever was made; if it had been, the plaintiff could probably have laid the foundation for the introduction of the notes, by proving the consideration, and the failure to object must be regarded as a waiver of the objection. It comes too late on an application for a new trial. It would be a surprise on the plaintiff. This is not the case of a verdict without evidence to sustain it, and therefore a proper one for a new trial; but it is a verdict upon sufficient evidence, which was admitted without a proper foundation being laid for its introduction.

Digitized by Google

Especially was the proof sufficient when taken in connection with the admissions of the agent, that he had purchased goods of the plaintiff. This was a circumstance conducing to prove that the contract was made within the scope of the authority, and the admissions of the agent, as to matters in which he is authorized to bind the principal, are the admissions of the principal. By permitting the notes to be read without objection, the defendant tacitly admitted that they were given for merchandise to keep up the mercantile establishment.

The judgment must be affirmed.

Digitized by Google

BERNARD MCKIERNAN et al. *vs.* WILLIAM MASSINGILL.

In order to authorize a publication against a non-resident defendant to a suit in chancery, it must appear in the record by affidavit that such defendant is a non-resident of the state; an affidavit, therefore, merely that he is a citizen of a different state will not be sufficient.

IN error, from the vice chancery court at Columbus; Hon. Henry Dickinson, vice chancellor.

The bill in this case was filed in the chancery court at Columbus, on the 14th day of December, 1841, by William Massingill against Bernard McKiernan, William D. Stone, and William Gray. The bill alleges that, some time in the year 1837, complainant sold to Jordan Elder a plantation and seven negroes, in Hinds county, for the sum of fourteen thousand dollars, and took their several promissory notes for the same, of equal amounts, payable on the 1st days of February, 1839, 1840, and 1841, for the purchase-money; and to secure the payment of the same, said Elder conveyed land in Hinds, and the seven negroes mentioned in the bill, to James Scott, with power to sell, upon default in payment of said notes. That said trustee has left the United States and gone to Texas. That said Elder, intending to defraud complainant, since said notes or one of them became due, took possession of the following of said negroes, to wit, Sam, Maria and her children, Henry and Alfred, Jordan and Maria, and sold them to Bernard McKiernan, a citizen of Louisiana, who knew of the conveyance in trust. That the agent of complainant took the said negroes from the possession of the said McKiernan, in the state of Louisiana where they had been taken, and exceeding his authority, sold them to William D. Stone and William Gray, of the county of Noxubee. That said McKiernan has traced said negroes, and

Digitized by Google

has obtained a writ of *habeas corpus* for the purpose of obtaining possession of said negroes; and complainant was afraid he would succeed, and would remove said negroes to Louisiana, and thereby complainant be remediless. That McKiernan has an action of detinue depending against said Gray and Stone, in the county of Noxubee. The bill prayed for injunction, and that the negroes be delivered to a trustee, to be appointed to execute the trust aforesaid, and for general relief. The bill was sworn to on the 14th October, 1841, and injunction granted as prayed for.

At the December term, 1841, without other affidavit, but upon the sworn bill, an order of publication was made against McKiernan, directing him to appear at the following June term. Publication was made, in which it was recited "that upon opening the matters of this bill, it appears to the satisfaction of the court that the defendant B. McKiernan now is not an inhabitant of this state, but resides beyond the limits thereof." At the May term following, on proof of publication, *pro confesso* was taken against McKiernan. Process was served on the other defendant, and *pro confesso* against all of them but Stone, who answered, admitting the allegations of the bill.

At the November term, 1842, decree against McKiernan, that he be perpetually enjoined, and that the negroes be delivered to a trustee appointed, was made. The decree recites "that it appears from the complainant's bill, that B. McKiernan is not a resident citizen of this state, and that publication has been made according to law."

R. Hughes, for plaintiffs in error.

At the time of the order of publication against McKiernan, no affidavit was made of his non-residence. True there was an affidavit to the allegations of the bill, and the bill states that he was a citizen of the state of Louisiana at the time of the filing the bill. *Non constat* that he was so, when the order of publication was made. The allegation that a party is a citizen of another state alone will not do; it must appear by affidavit, or return of an officer on a *subpœna*, that he is a non-resident, so that process cannot be served. See Revised Code, 159, sec. 5.

Digitized by Google

L. Lea, for defendant in error.

The bill alleges that McKiernan is a non-resident. It is sworn to. There was an order of publication, which was duly executed. This order was made because "it appeared to the satisfaction of the court that McKiernan was not an inhabitant of this state, but resided beyond the limits thereof, so that the ordinary process of the court could not be executed on him." It is submitted that nothing more is required to be shown in order to give the court jurisdiction as to McKiernan. He had, at least, constructive notice of the suit, and he should have answered the bill.

Mr. Justice CLAYTON delivered the opinion of the court.

The only question involved is as to the sufficiency of the allegation of the foreign residence of the defendant below, the plaintiff in error, to justify the proceeding by publication against him. The bill states that McKiernan is a citizen of Louisiana. The bill is sworn to, but no affidavit is filed according to the 11th rule of the chancery court. The record says, "upon opening the matters of this bill, it appears to the satisfaction of the court, that the defendant B. Kiernan is not an inhabitant of this state, but resides beyond the limits thereof." The decree recites, "that it appears from the complainant's bill, that B. McKiernan is not a resident citizen of this state, and that publication had been made according to law, &c." From these portions of the record — and they are all which bear upon the point — it is manifest that the only evidence to authorize the proceeding by publication is the statement contained in the bill, and that goes only to citizenship. The statute authorizes publication, in lieu of service of process, upon proof "that the defendant is out of this state." H. & H. 522. All that is stated in this bill may be conceded to be true, and yet the defendant may have been within this state, and entirely within reach of the process of the court at the time the bill was filed. A man's domicil, his home, the seat of his citizenship, may be in one state, and yet he may reside a large portion of his time in another. Citizenship, in cases of this kind, is not the point involved, but the liability of

Digitized by Google

the defendant to the process of the court. Absence from the state, so as to put him beyond the reach of service of process in the ordinary way, is what gives right to resort to publication as a substitute for service of process.

For this defect the judgment must be reversed.

Digitized by Google

AUGUSTUS I. JENNINGS et al. *vs.* JOSEPH DENNIS and MOSES GRANBERRY, Administrators of Stephen Granberry, deceased.

Where money is levied upon several executions, that is entitled to be first satisfied which issued upon the oldest judgment.

J., being a judgment creditor of V., sued out his execution of *fieri facias;* subsequently D., also a judgment creditor of V., whose judgment was three days the older, issued likewise execution; the executions were both levied on the same day on two slaves, the property of V. Before the levy, J. gave an indemnifying bond; two days after the levy, D. gave a similar bond; soon after, and before the executions on which these levies had been made had been otherwise acted on, D. sued out an *alias fi. fa.* to another county, and had it levied on another slave, the property of V. Afterwards D., finding the first levy sufficient, and relying on it for his debt, released the levy on the last execution. On motion for the appropriation of the money made by the sale of the two slaves first levied on, *held*, that D.'s judgment being the oldest, and nothing having been done to lose its lien, was entitled to the money.

ON appeal, from the circuit court of Hinds county; Hon. John H. Rollins, judge.

Joseph Dennis and Moses Granberry, administrators of Stephen Granberry, deceased, on the 9th day of February, 1842, obtained judgment in the circuit court of Hinds county against Elias Vickers, for $676 08. On the 12th day of February, 1842, Augustus I. Jennings and ——— Drone in the same court recovered judgment against the same person for $1465 39. On the 25th of November, 1842, Jennings and Drone sued out a writ of *fieri facias*, directed to the sheriff of Hinds county, and had the same, upon executing to the sheriff a bond of indemity, levied, on the 5th of December, upon two slaves, George and Isaac, as the property of Vickers. On the 30th of November, 1842, Dennis and Granberry also sued out a *fi. fa.* directed to the same sheriff, which was levied on the same slaves on the

Digitized by Google

same day; the other execution was levied December 5, 1842; and on the 7th of December, Dennis and Granberry executed a bond of indemnity. On the 15th of the same month, and before any further action was had on these levies, Dennis and Granberry caused another writ of *fieri facias* on the same judgment to be issued to the sheriff of Warren county, and had the same levied on a slave named John, the property of Vickers; upon which execution the sheriff of Warren returned that he had not sold the slave levied on for want of time. Dennis and Granberry afterwards, on the 21st of December, 1842, released and discharged the levy on the slave John, made by the sheriff of Warren county. The slaves levied on in Hinds county were sold by the sheriff of that county, and at the December term, 1842, of the court, he moved for an order appropriating the money made by their sale. The circuit court decreed the money to be paid to the satisfaction of the judgment, in favor of Dennis and Granberry, to which Jennings and Drone excepted, and prosecuted an appeal to this court.

E. W. F. Sloan, for appellants.

Where two executions, in favor of different judgment creditors, are levied on the same property, he whose judgment was first rendered shall be first entitled to the proceeds of the sale. That is admitted to be the rule, when other circumstances do not intervene to change it. In this case, the appellants, by indemnifying the sheriff, having procured a levy of the property in Hinds, and thereby obtained a specific lien upon it, the appellees had a right to abandon their levy on the same property, and resort to the property in Warren for the satisfaction of their judgment. They chose to do so; and I contend that by so issuing their second execution, they necessarily waived the first and all benefit under it. So it was held unanimously in the case of *Eckhols* v. *Graham et al.* 1 Call, 492.

"Where a party sues out a second execution before the property taken by the first is disposed of, he waives the first execution, and destroys the lien on the property." 2 Tucker's Com. 365.

UNIVERSITY OF MISSISSIPPI LAW LIBRARY

Digitized by Google

The second execution may have been irregular, but it was not void. If irregular, it could have been quashed or set aside by order of court upon motion of one of the parties only. This was not done, and the levy made by it was good. The sheriff of Warren committed no trespass in making it; the property was thereby changed, and became subject to sale for the satisfaction of the judgment.

Besides, the appellees, having thus obtained a specific lien on the slave in Warren, to the exclusion of Jennings and Drone, were bound so to use the security thus acquired a not to prejudice the rights of the appellants. 17 Ves. 520; 4 Johns. Ch. R. 19.

It follows that the court below erred in refusing to direct the proceeds of the sale in controversy to be applied in satisfaction of the judgment in favor of Jennings and Drone.

Davenport and *Greaves*, for appellees.

1. The oldest judgment is entitled to be first satisfied, unless it has been delayed or suspended in fraud of the rights of other creditors. *Grand Gulf Bank* v. *Henderson*, 5 How. R. 292; *Smith* v. *Ship*, 1 Ibid. 239; *Biggam* v. *Merrit*, Walker's R. 430; *Lyn* v. *Gridley*, Ibid. 547; *Carlton* v. *Osgood*, 6 How. R. 285; *Robinson* v. *Green*, Ibid. 223; *Andrews* v. *Doe, ex dem. Wilkes*, Ibid. 554; *Commercial Bank of Manchester* v. *The Coroner of Yazoo County*, Ibid. 530.

2. Where the executions are levied at the same time, the issuance of the execution on the junior prior to that on the senior judgment, will not give the junior judgment priority. *Commercial Bank of Manchester* v. *The Coroner of Yazoo County*, 6 How. R. 530; *Cresson* v. *Stout*, 17 Johns. 116; *McCormick* v. *Miller*, 3 Penn. R. 230; *Wood* v. *Vannarsdale*, 3 Rawle, 401; *Burchard* v. *Rees*, 1 Whart. 377; 12 Wend. 405.

3. The issuance of the execution to Warren county, and the release of the levy under it, did not impair or divest the lien of the older judgment. H. & H. tit. Execution, § 1; *McGeher* v. *Handly*, 5 How. 625; *Bibb* v. *Jones*, 7 Ibid. 397; *Pickens* v. *Marlow*, 2 S. & M. 428.

Digitized by Google

Mr. Justice THACHER delivered the opinion of the court.

Appeal from the circuit court of Hinds county.

The appellees recovered a judgment against Elias Vickers on the 9th day of February, 1842, and the appellants recovered a judgment against the same party on the 12th day of February, of the same year. On the 25th day of November following, the appellants sued out a writ of *fieri facias* upon their judgment, directed to the sheriff of Hinds county, and having indemnified him, caused a levy to be made upon two slaves, George and Isaac, the property of Vickers. On the 30th day of November, of the same year, the appellees likewise sued out a writ of *fieri facias* upon their judgment, directed to the sheriff of Hinds county, and on the 7th day of December following, indemnified him against the consequences of a levy. On the 5th day of December, both executions were levied at the same time upon the slaves George and Isaac. On the 15th day of December, and while no disposition had been had upon their *fieri facias*, and levy already sued out and had, the appellees caused another writ of *fieri facias* on their judgment to be issued, directed to the sheriff of Warren county, and to be levied upon a certain other slave, named John, the property of Vickers. Upon this execution, the sheriff of Warren county returned that the property had not been sold for want of time; and, thereupon, the appellees directed the sheriff of Warren county to release and relinquish the levy upon the slave John, choosing to rely upon the levy made by virtue of the *fieri facias*, in the hands of the sheriff of Hinds county. Upon the motion of the sheriff of Hinds county, the court below directed the proceeds of the sale of the property levied upon and sold to be appropriated to the execution of the appellees in preference to that of the appellants. Hence this appeal to this court.

This court has laid down the general rule, that when money is levied upon several executions, that is entitled to be first satisfied which issued upon the oldest judgment. *Biggam* v. *Merrit*, Walker's R. 430; *Lyn* v. *Gridley*, Ibid. 547; *Smith* v. *Pickett & Ship*, 1 How. 237; *Grand Gulf* v. *Henderson*, 5 How. 294. The statute of this state, H. & H. 629, § 2, allows a judg-

Digitized by Google

ment creditor to issue other executions, although one be already taken out, provided the first be not returned and executed. By this statute executions may be issued to other counties, and as a consequence, may be waived or released by the judgment creditor, without affecting his judgment lien in favor of junior judgment creditors.

Judgment affirmed.

Digitized by Google

14 384
74 133

SAMUEL M. PUCKETT *vs.* THOMAS GRAVES, Use of Thomas Lyne.

Although, as a general rule, a writ of error cannot be prosecuted after the forfeiture of a forthcoming bond, yet, if that bond be made the subject of a motion and judgment, a writ of error may be granted to reverse that judgment, because it is a distinct and independent matter.

Where the record showed that, at the December term, 1842, of the circuit court, a motion was made to quash a forthcoming bond, which was taken under advisement, and not decided in four months, as required by the statute; and afterwards, at the December term, 1843, a like motion was made to quash the forthcoming bond, which was sustained, and the bond quashed; *held*, although no forthcoming bond was embodied in the record by bill of exceptions, yet it sufficiently appeared that the motion to quash, which had been sustained, was not made at the return term of the forthcoming bond, and was therefore erroneously sustained.

Where a motion to quash a forthcoming bond is taken by the circuit judge, under advisement, and his decision not rendered in four months, as required by the statute, H. & H. Dig. 481, the motion will be considered as having expired with the term.

Every motion made in a cause constitutes part of its history, and is as much a part of the record as the declaration, plea, or judgment.

IN error, from the Rankin circuit court.

The record in this case exhibits the following statement of facts, viz.: The record of a judgment in favor of Thomas Graves, who sued for the use of Thomas Lyne against John Shields, Samuel M. Puckett, and William H. Shelton, for $1755 54, rendered on the 17th of April, 1838. At the April term, 1839, a motion was made, in these words: "Motion in this case by defendant's counsel to quash the forthcoming bond for the following reasons, viz.:" (The record contains eleven reasons, which it is not deemed requisite to copy.) "Whereupon," proceeds the record, "argument being heard, and the court now sufficiently advised, it is considered that said bond be quashed, upon the ground that it does not appear by the return

Digitized by Google

of the sheriff on the bond that the same was forfeited." Following this entry in the record is a writ of error and *supersedeas*, to remove the case from that judgment to the high court of errors and appeals; the decision in that court, whether sustaining or reversing the judgment below, does not appear in the record.

There then follows this entry in the record:

"*December Term*, 1842; *Thomas Graves, use, &c.* v. *John Shields et al.* Motion by plaintiff in execution, to quash the forthcoming bond, for the following reasons, apparent on the record: 1st. There was no levy made at the time of executing the bond; 2d. The bond is not in double the amount due on the execution; 3d. The condition of the bond is not such as is required by the statute, in this, it does not provide that the bond shall be void on payment of the money; 4th. The bond is not such as the statute provides.

D. SHELTON, *for motion.*
LOMBARD, *contra.*

"Entered at December term, 1842, and taken under advisement by the court."

Then follows this entry in the record, viz.:

"*December Term*, 1843; *Thomas Graves, use, &c.* v. *John Shields et al.* The plaintiff moves the court to quash the forthcoming bond in this case for reasons filed.

D. SHELTON, *for motion.*
LOMBARD, *contra.*

"And thereupon said motion being heard, and the court being sufficiently advised thereof, it is therefore ordered, adjudged, and decreed, by the court, that said motion be granted, and that said forthcoming bond be quashed."

Upon this record, Samuel M. Puckett, one of the defendants in the original judgment, applied, by petition, for a writ of error, to have the judgment quashing the forthcoming bond revised. The writ of error was granted, and the record exhibiting the foregoing facts filed in this court. Upon it the defendant in error moved to dismiss the writ of error. The cause was

Digitized by Google

submitted upon that motion, and if that was overruled, then upon the merits.

D. Shelton, for motion to dismiss.

This writ of error was taken out under the 47th section of H. & H. 540, and complies with that section. That act was passed in 1830.

The motion to dismiss is predicated on the 4th section of an act passed in 1837. Laws of Miss. 753. (H. & H. 541.) I refer to Laws of Mississippi, because in H. & H. the sections are not given; in the Laws of Mississippi they are, and the section referred to is as follows:

"Sec. 4. *Be it further enacted*, That no writ of error shall be granted in a case where a forthcoming bond shall have been given, and forfeited; and upon all affirmances of the judgment under this act, the same damages shall be allowed as are now recognized on appeal cases."

My position is, that this section takes from the clerk the power to grant a writ of error where the record filed in his office shows that a forthcoming bond has been taken and forfeited. The language of the section is neither doubtful nor equivocal. It requires no construction by reference to other parts of the act, or to the object of the law. It is prohibitory in all cases. Its meaning may easily be drawn from the language of the section itself. Its construction is not doubtful, but its language is direct and certain: nothing less, therefore, than palpable absurdity upon the face of the act, can prevent its language from being the law of the land.

But it may be replied, that it takes from the party all remedy for an erroneous judgment of an inferior court. If such were the case I would concede the point; but it is not. By H. & H. 538, sec. 39, 40, 41, he has an appeal from the judgment of the court below, to be taken during the term of the court. This is an efficient remedy, and, moreover, it is a remedy more politic and more proper than that by writ of error. The object of the 1st and 2d sections of the law of 1837, is to afford facilities for testing the merits of the cause before the highest

Digitized by Google

tribunal in the state. The object of the 4th section is to cut off contest after those merits have been tested; both objects are legitimate and proper; a full adjudication of the cause first, and an end of strife afterwards.

The practical results of enforcing the statute will be fair and just. After judgment has been given against a defendant, after he has given a forthcoming bond, by which he acknowledges the correctness of that judgment, after he has violated his good faith by not delivering the property as he by said bond binds himself to do, it is scarcely fair that he should renew the conflict by motion; coerce some judgment of the court upon that motion, it may be a correct judgment; remain passive for three years, or until the money is about to be forced from him, and then, as a matter of right, suspend, by writ of error and *supersedeas*, the payment, until the cause can be litigated in the supreme court. See 3 How. 34.

The act of 1837 very wisely leaves in force the remedy by appeal from all judgments rendered subsequent to the forfeiture of the bond, because that remedy will attain justice equally well with the writ of error, and cannot be made a mere engine to harass an adverse litigant, and to prolong payment. It is guarded from abuse, because it must be taken during the term at which the judgment complained of was rendered, and may not be obtained three years afterwards, because it may not be demanded as a matter of right, but must be allowed under an order of court.

For these reasons I think the act should be enforced, and that its language correctly interprets the object of the legislature, and must be enforced.

This view of the case is strengthened by the 3d section of the act of 1837, which provides "that all acts, or parts of acts, inconsistent with the provisions of this act, are hereby repealed."

Now so much of the 47th sec. H. & H. 540, as authorizes the clerk to issue a writ of error, after a forthcoming bond taken and forfeited, is inconsistent with the 4th section, above recited.

Digitized by Google

W. Yerger, for plaintiff in error.

There is no bill of exceptions incorporating the bond in the record, and consequently it is said this court cannot say whether there was error or not. To this I answer, that this court has repeatedly decided that a judgment quashing a forthcoming bond after the return term, is void. Now it appears clearly from the record, that this motion was made many terms after the return, to wit, the return on the execution, showing when the bond was taken. Second, the motion and order, quashing the bond made at the May term, 1839, and which was reversed by this court. Third, a motion made at the December term, 1842, to quash the bond taken under advisement, and not disposed of; — all of which entries and orders are on record, and show that the motion in this case was made many terms after the return, and is therefore void.

D. Shelton, for defendant in error, on final hearing.

To avoid unnecessary controversy, I will admit the principle decided in *Field* v. *Morse and Harrod*, 1 S. & M. 347, "That an order of court, quashing a forthcoming bond, after the return term, is erroneous." But I am far from admitting that that principle decides the present case.

There is nothing in this record to negative the position that the bond quashed at the December term, 1843, was returnable to that term. I admit that the transcript filed shows that a bond was taken, returnable to the October term, 1838. I admit that, by the judgment of this court, at the January term, 1841, (6 How. 262,) the judgment of the circuit court of Rankin county quashing that bond, made at its April term, 1839, was reversed, and consequently that bond was in force and effect after the January term, 1841, of this court. But I deny that the plaintiff in error can sustain by this record that the bond before mentioned is that bond which was quashed by the order made at the December term, 1843. If the plaintiff in error seek to reverse a judgment, he must put his finger upon the error, and show its existence by the record; all doubts and presumptions are in favor of the correctness of the judgment be-

Digitized by Google

low. 6 How. R. 266. And though there be a copy of a forthcoming bond in the transcript, there is no evidence that it is the same that was presented for the consideration of the court below. And this court cannot notice it unless it be made a component part of the record, by being spread at length in a bill of exceptions. The bond constitutes no part of the record, unless made so by bill of exceptions. 2 How. R. 845; 4 Ibid. 328; 5 Ibid. 278; 6 Ibid. 262, 580; 1 S. & M. 629; 2 Ibid. 535.

A comparison of the case of *Conn* v. *Pender*, 1 S. & M. 386, and *Pender* v. *Felts*, 2 Ibid. 539, will, I think, correctly settle the rule upon this question. These cases both grew out of the same bond, and the same motion to quash.

In the circuit court Pender had obtained judgment against Felts. He gave a forthcoming bond, with Conn as his surety, forfeited September term, 1838. At the June term, 1840, a motion was made to quash the bond. It was quashed as to Felts, and motion overruled as to Conn. A *fi. fa.* was issued against Conn on the bond, and again he moved to quash both bond and execution, which the court refused to do. Conn excepted, and on his exceptions brought this last motion before this court, which reversed the judgment and quashed the execution, without quashing the bond.

But Pender had taken no exceptions to the order quashing the bond as to Felts, at the June term, 1840. Nevertheless, by writ of error, he brought up to this court the judgment of June term, 1840, and asks this court to reverse that, and thereby restore the validity of the bond. The court say, "The bond is not made a part of the record, nor does it appear at what term the bond was forfeited, or for what reason it was quashed. A judgment is a conclusion of law upon ascertained facts. We can only judge of the propriety of the conclusion, from an inspection of the facts. We must presume, under these confined means of judging, that the court below did not err."

The decision in the case of *Conn* v. *Pender* is that which I admit at the beginning of this argument, "That an order quashing a forthcoming bond, after the return term thereof, is

erroneous." The case of *Pender* v. *Felts* determines all that I contend for in the present case, and what is decided in other cases already referred to, "that this error is not shown, and cannot be noticed by this court, unless the bond quashed be made a part of the record, by being spread at length in a bill of exceptions."

All that this court can do in the present case, is to affirm the judgment of the court below, because no error is apparent upon the face of the record.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

On petition for re-argument.

This case is submitted on a motion to dismiss the writ of error, and also on the merits, if that motion should be overruled. The ground relied on for dismissing is, that a writ of error was granted after a forthcoming bond had been forfeited, and yet on the merits it is insisted that the judgment of the circuit court must be affirmed, because there is no forthcoming bond set out in the record. If there be no bond, how are we to know that the writ of error was granted after a bond had been forfeited? The counsel for the defendant in error seeks first to dismiss, and if that cannot be done, then he seeks to sustain a judgment by which a forthcoming bond was quashed. If the bond was quashed, the presumption is that it was void, and presented no impediment to the suing out of a writ of error. But the truth is, the writ of error brings up the judgment only by which the bond was quashed, rendered at December term, 1843. Although a writ of error, as to the original judgment, is barred by the forfeiture of a forthcoming bond, yet if the bond be the subject of a motion and judgment, a writ of error may be granted to reverse that judgment, because it is a distinct and independent matter; it is then a new proceeding, and that is the case in this instance. There is therefore no ground for dismissing.

As the record is defective in not containing the bond, properly incorporated in a bill of exceptions, we have no means of knowing whether the bond was so defective as to justify the

Digitized by Google

judgment, and the presumption would be that the judgment was correct, until the contrary was shown. But on the other side, it is insisted that the judgment by which the bond was quashed was rendered at a term subsequent to the return term, and for that reason ought to be reversed. To this it is answered, that no such fact appears by the record. What, then, does the record show? First, the original proceedings in the suit up to judgment; second, a motion to quash a forthcoming bond, made at April term, 1839, and sustained; third, a motion made at December term, 1842, to quash a forthcoming bond, which was taken under advisement, but the record does not show any judgment on it; and, fourth, another motion to quash the forthcoming bond, made at December term, 1843, which was sustained, to reverse which this writ of error was granted. The argument is, that nothing but this last motion is properly a part of the record, and beyond this we cannot look. It is impossible to perceive any reason why one motion to quash a forthcoming bond in a cause should be part of the record, and another motion of the same kind, made in the same cause, should not constitute part of the record. It is a mistake to suppose that it is not so. Every motion made in a cause constitutes part of its history, and is as much a part of the record as the declaration, plea, or judgment. The evidence offered is no part of the record, unless made so by bill of exceptions. In this aspect of the case how does the matter stand? In April, 1839, a bond was quashed on motion. At December term, 1842, another motion was made to quash a forthcoming bond, which was taken under advisement, and never decided; and a year afterwards, at December term, 1843, another motion was made to quash the same bond, as we must suppose, that was attempted to be quashed at December term, 1842. We say that the two last motions were made to quash the same bond, because there can be but one valid bond given; the law does not allow more, and, as the bond was not quashed on the motion in 1842, it must have been the same bond which was quashed in 1843. Assuming, then, that December term, 1842, was the return term of the bond, that was the proper term to quash it; and

Digitized by Google

although the court may have had the power to take the motion under advisement, yet the decision should have been made in writing, within four months. H. & H. Dig. 481. And as it was not so made, the effect was, that the motion expired with the term. According to this view of the case, the bond was quashed twelve months after the return term. That was too late, and the judgment was therefore void. The truth is, however, the first judgment quashing the bond, rendered at April term, 1839, was brought to this court by writ of error, and the judgment reversed. The bond, then, which was quashed at December term, 1843, was returnable at least as early as April, 1839. But it is insisted that this does not appear by the record; that it is only theory. It is a theory which we shall always feel bound to adopt when an effort is made to get rid of the effects of the judgments of this court, and the rules of law they establish. If we are to shut our eyes against our own judgments, we may be called on to decide cases over and over again.

Judgment reversed.

The defendant in error, on the delivery of the foregoing opinion, applied in the regular way for a rehearing. The application was refused.

Digitized by Google

JOSHUA JAMES et uxor *vs.* W. W. ROWAN et uxor.

The representatives of the deceased husband are the only proper parties to a proceeding by the widow to be endowed of her husband's realty.

On proof of marriage, of seisin of the husband during the coverture, of non-alienation on the part of the wife, and death of the husband, she is, against the representatives of the husband, entitled to dower in his realty.

The rights of third parties are in nowise affected by a decree of the probate court allowing dower to the widow in her deceased husband's realty; those who have such rights may put the widow to her ejectment or other appropriate remedy; and in such proceeding the respective claims will be considered in a great degree as if no decree of the probate court had been pronounced.

Where third persons are made parties to a widow's application for dower in her deceased husband's realty in the probate court, and contest her right, the consent of the parties thereto will not give that court jurisdiction of the subject-matter; and the rights of the parties thus illegally before the court will remain the same as if no decision had been made affecting them.

Where a deed was made to J. and his sister, conveying a tract of land to them jointly, on the application of the widow of J. for dower in the land thus conveyed, his sister being in possession, *held*, that the legal title in J. by the deed, in the absence of proof of an ouster, or that the possession of his sister was adverse, entitled his widow, as against his representatives, to dower in the land; nor could the probate court enter upon the inquiry as to whether J. was a trustee for his sister, who had paid the purchase-money for the land; that inquiry, and any other affecting his sister's title to the land, or the rights of other persons, may be presented when the widow attempts to enforce her allotment of dower.

Under a joint conveyance the possession of one will be deemed the possession of both, unless there were an ouster.

ON appeal, from the probate court of Jefferson county; Hon. Robert Duncan, judge.

W. W. Rowan and Roxana, his wife, filed their petition in the probate court of Jefferson county, setting forth that Roxana was formerly the wife of J. N. H. Wood, to whom she was

Digitized by Google

married on the 18th January, 1839; that during the time she was the wife of Wood, he was lawfully seised and possessed, jointly with his sister, Mary K., now the wife of Joshua James, of a certain tract of land in Jefferson county, which was conveyed to him and his said sister by Williams and Turner, by deed bearing date the 1st January, 1834, a copy of which deed is filed and made part of the petition. They further allege, that during the lifetime of said Wood, and on the 17th June, 1841, the Commercial Bank of Natchez recovered judgment against Wood in the Adams circuit court, and that on the 11th December, 1843, said tract of land was sold by the sheriff of Jefferson county under an execution, issuing upon said judgment, and purchased by the Commercial Bank of Natchez. They further allege that after the issuance of said execution, but before the sale, the said Wood died seised of said tract of land, leaving one child, and having first made his last will and testament, appointing Alexander Montgomery his executor. They further represent that they intermarried after the death of Wood, and that the said Roxana has now relinquished her dower to said land. They then pray that Montgomery, the Commercial Bank of Natchez, and James and wife, may be made parties to the petition, and cited, &c., and that the necessary order may be made for the allotment of the said Roxana's dower, &c.

The answer of James and wife admits that they are in possession of the land described in the petition, and that it was conveyed as stated therein; but they deny that Wood was seised or possessed of any part of said land during his marriage with Roxana. They aver that said land and eleven negroes were purchased by said Wood and defendant Mary in the year 1834, of Williams and Turner, for $16,000, payable in four equal instalments, one being in cash at the time of the purchase. That said Wood and defendant Mary, then and before the marriage of said Wood and Roxana, verbally agreed that Wood should take the slaves as his part of the purchase, and that defendant Mary should take the land as her part; since which time she has ever held and possessed said land as her own exclusive property, and Wood never thereafter claimed

Digitized by Google

any title or interest therein; and in the year 1836, or January, 1837, and long before the marriage of Wood and Roxana, Wood took exclusive possession of said slaves, and disposed of them as his own property. They further aver that the first and last payments for said land were made by defendant Mary with her own funds, and that the second and third payments, due in 1835 and 1836, were made with the joint funds of her and Wood, they being during these years partners in planting. They further state that although it was mutually agreed between them, at the time of the purchase, that said land should be the separate property of defendant Mary, and said slaves the separate property of said Wood, yet said Wood caused the conveyance thereof to be made jointly to himself and defendant Mary; and although said Wood received and disposed of the whole of said slaves as his sole and separate property, yet he wholly neglected to make to defendant Mary a conveyance for the undivided moiety which had been thus conveyed to him; defendant Mary, who is the sister of said Wood, and placed entire confidence in him, believing all the time that the title to said land had been made solely to her, and that she was sole owner of the same. They further allege that after his marriage with Roxana, said Wood made his will, which was regularly admitted to probate at the July term, 1842, of the probate court of Adams county, a copy of which is filed as exhibit No. 1; that Wood, at the time of his death, left both real and personal estate, and that although more than two years had elapsed between the probate of said will and the filing of said petition, the said Roxana had never renounced the provisions of said will in her favor, and defendants claim the same benefit from these allegations as if they had been specially pleaded in bar. They further allege that by said will it was provided by said Wood that all matters in difference between him and defendant Joshua should be referred to arbitration, as previously agreed on between them; and that one of the matters intended to be referred was the title to said land, and its conveyance free from incumbrance by Wood to defendant Mary; and defendants say that they are still willing and anxious said arbitration should be

Digitized by Google

made. They further say that previous to the death of Wood, the Agricultural Bank recovered judgment against him in the Adams circuit court, and that said land was sold under said judgment, and the undivided interest of the said Wood purchased at said sale by said bank, and that the same has since been purchased of said bank by defendant Mary. They further say that the judgment in favor of the Commercial Bank of Natchez, in the petition mentioned was founded on a note given by Wood for his individual debt, and that defendant Mary was only his surety.

Upon the trial of the cause, the petitioners read in evidence the copy of the deed from Williams and Turner to Wood and Mary K. Johnson; and proved that Wood intermarried with Roxana in 1839, and died in 1842, and that petitioners intermarried in 1843; that defendants, Joshua and Mary K. intermarried before the filing of the petition; and that defendant Mary K. is the Mary K. Johnson mentioned in the deed from Williams and Turner.

The defendants, Joshua and Mary K. then read in evidence the deposition of Mrs. Sarah C. Smith, taken by consent.

She states that about the first of January, 1834, her brother, J. N. H. Wood, and her sister, Mary K. purchased the land on which Mary K. now resides, and eleven slaves; that at the time of the purchase it was agreed between her brother and sister, that her brother should take the negroes and her sister the land, and that this arrangement was generally understood by every member of the family, and most probably by the neighbors. At the time of the purchase, her brother and sister entered into partnership in planting, which lasted three years. Her brother had but one or two slaves previous to the purchase, and a patrimony which he afterwards received, of about $5000. Her sister, Mary K. had about twenty working hands, and furnished the cash to make the first payment on the purchase of the land and negroes. In 1837, the partnership ceased, and her brother sold the eleven slaves that had been purchased with the land, and gave up the place to her sister, Mary K. That during the three years they planted together, her brother had the proceeds of all the

Digitized by Google

crops, the product of the labor of near forty hands, except the small amounts that were necessary to defray the expenses and store accounts of her sister, and that in 1837, her sister was left to pay the balance of the purchase-money, upwards of $3000, for said land and slaves. That her brother was not married to Roxana till 1839, and that he made a will, &c. That her brother was a large creditor of the estate of J. P. Smith, having loaned him notes amounting to more than $10,000, the proceeds of sale of said slaves. That she had been informed by judge Dubuisson that the debt from the estate of Smith to the estate of Wood had been allowed as a privileged claim, and consequently must be worth considerable. That said Wood, among other assets, had a claim against I. Armat of several hundred dollars, which was handed by his widow, Roxana, to the executor to collect, and upwards of $100 afterwards paid to the said Roxana. That at the termination of the partnership, her brother sold slaves to the amount of $25,000 or $30,000, and her sister, Mary K. was left with less than she commenced the partnership, and involved in debt on account of the firm several thousand dollars.

The defendants, Joshua and Mary K. then read in evidence the deposition of Stephen Williams, also taken by consent.

Williams states that in 1838 he had a conversation with Wood, in which Wood stated to him that his sister Mary K. James and himself had agreed that she should have the land, and that he should have the slaves or some of them, which deponent and Turner had sold to them, but did not state when said agreement was made. He further states that Mary K. James has been in the exclusive possession of said land since 1837, claiming it as her own, and he has never since then heard said Wood claim title to any part of it.

The said defendants then read in evidence a certified copy of the will of Wood, which appoints A. Montgomery his executor, desires that the arbitration agreed on between Joshua James and himself may be carried out by his executor according to the contract entered into between them, and provides that all property left after the payment of his debts shall be disposed of according to the laws of the state.

Digitized by Google

It was admitted by the parties that the will of J. N. H. Wood was probated more than six months before the filing of the petition, and that said Roxana had never renounced the provisions thereof; and that the estate of Wood has been reported insolvent, and commissioners appointed thereon.

Upon the foregoing petition, answer, and proofs, the court decreed that the said Roxana was entitled to dower, and order a writ to be issued to the sheriff of Jefferson county, in conformity to the statute.

From this decision the defendants prayed an appeal, and have brought the case up for revision.

John B. Coleman, for appellant.

To entitle a widow to dower, the husband must have died seised and possessed of the land, or must have been seised and possessed at some time during the coverture. H. & H. 351, sec. 41.

From 1837, two years before his marriage, up to the day of his death, Wood not only never was seised or possessed of the land, but never even pretended to have any claim to or interest in it.

The claim of his widow to dower rests upon the naked fact, that without any legal right to do so, and in violation of the agreement between his sister and himself, he took a deed for the land in the joint names of his sister and himself. Suppose that his sister had given him the money and requested him to purchase this land for her, and to take the deed to her, and that he had fraudulently taken the deed in his own name, would his widow have been entitled to dower? We apprehend not. He would have been held to be a mere trustee for his sister, without any sufficient interest in the land. His position in this case is precisely the same. He never had (at least during the coverture) any sufficient interest in the land, and was only a trustee for his sister.

"In order to entitle the wife to dower, the land must vest beneficially in the husband for his own use." 4 Kent, 39; Co. Litt. 31 (b. 4); Park, 47.

Digitized by Google

"A widow is not entitled to dower in lands conveyed by her husband before marriage, although the deed was unrecorded at the time of the marriage." *Blood* v. *Blood*, 23 Pick. 80.

"Both the freehold and inheritance must unite in the husband, in order to entitle the wife to dower." *Fisher* v. *Grimes*, 1 S. & M. Ch. R. 107.

It has been contended, that the probate court has no jurisdiction to try a question of title as between a widow claiming dower and a stranger; but that dower must be assigned to her, and the stranger left to his remedy at law.

To this we answer,

1. That the widow is bound, in order to establish her right to dower, to show, to the satisfaction of the court, that her husband was seised and possessed of the land in which she seeks to be endowed. H. & H. 351, sec. 41. Here she has entirely failed in showing either a seisin or possession.

2. That the probate court has full power on this head. In *Randolph* v. *Doss and Wife*, 3 How. 205, the court say, "The constitution and laws of this state confer upon the probate court general powers in cases of dower. These powers are not restricted by the relation of the parties to the suit. It is immaterial whether the contests for dower be between the widow and him, or the widow and a stranger."

The total absence of such a beneficial interest on the part of Wood, as is necessary to entitle his widow to dower, is so clearly established by the testimony, that we consider it unnecessary to press upon the court the other points which were made in opposition to the claim of dower in the court below.

Whiting, for appellee.

1. On the seisin of Wood, cited 1 Coke Lit. 662, 663.

2. On the subject of the verbal agreement to convey by Wood to Mrs. Johnson, and its effect, as operated on by the statute of frauds, cited the following authorities: Fonbl. Eq. 46, note; 2 Story's Eq. 59, 445; H. & H. 370, 551.

Digitized by Google

Montgomery and *Boyd*, on same side.

The legal question presented by the petition, answer and proof, scarcely admits of doubt. The sale to Wood and his sister gave Wood the legal title to an undivided moiety in the land. This legal title continued till his death; it was accompanied by possession, from the date of the purchase till the dissolution of the partnership between him and his sister, in 1837. The equities between Mrs. James and the petitioner cannot be settled by the probate court, and will remain unaffected by its decision. That part of the answer which is relied on by way of plea is of no effect. There were no provisions in the will by which Mrs. Wood could take anything. The will, in law, is only effectual in the appointment of an executor. After the payment of debts, the property is required to be disposed of according to law, and that leaves it to pass under the law, and not under the will. In this respect the will is of no force, for it is every man's will that the general laws shall have effect, till the contrary appears. But the clause, as to arbitration, is not shown to apply to this case, for there is no proof that this was one of the differences alluded to by the testator. He spoke of the differences with James, and not with his wife.

That part of the answer which sets up an agreement about the land is equally unavailing. There is no proof that the deed was taken by Wood to himself and his sister improperly. It is simply alleged, but not proved, and the contrary is clearly shown. How else would there have been any necessity for an agreement about it? Although Mrs. Smith says the understanding was settled prior to the purchase that Mrs. Johnson was to have the land, yet she does not pretend that the purchase was not to be jointly made. On the contrary, that fact appears in the whole case. A partnership was formed at the same time, to continue for three years. At the end of this time, Wood took the negroes and left the land with his sister; but he made no deed. The answer complains that Mrs. Johnson was compelled to make payments of more than her share. Now these facts can only be reconciled by the idea that the purchase was joint, and the agreement was for a division afterwards, and after the part-

Digitized by Google

nership should be at an end. We have proceeded on the ground that a lawful agreement, in regard to this land, had been shown, which is clearly not the case.

There was but one point before the probate court, which it was competent to decide; that was, the legal title or seisin of Wood, and that is admitted. The decree upon it cannot be erroneous, and the other subjects of difference must be settled by some other tribunal.

Mr. Justice CLAYTON delivered the opinion of the court.

This was a petition for dower in the probate court of Wilkinson county. The only question seems to be, whether Wood, the first husband of Mrs. Rowan, was seised during the coverture, so as to entitle her to dower. The land, together with a number of slaves, was conveyed jointly to him and his sister, Mrs. James, then unmarried. Before his marriage, Johnson and his sister the appellant agreed verbally that he should take the slaves, and that she should have the land; but this agreement was never reduced to writing. He never had actual possession of the land after his marriage, and she was in possession during the whole time. There was a will made by Wood, but it can have no influence on the decision, because it directed, after payment of his debts, that his property should be disposed of as the law directs.

The probate court decreed dower to the petitioner, from which an appeal is taken to this court.

From the nature of the probate court, it is wholly unfit to decide upon the title to land, where there is a conflict of claims. We have repeatedly decided that it is not within its jurisdiction to do so. If there be proof of marriage, of seisin of the husband during the coverture, of non alienation on the part of the wife, and death of the husband, she is, against the representatives of the husband, entitled to dower. Those representatives are the only proper parties to the proceeding. H. & H. 352. The rights of others are wholly unaffected; and the decree in no manner operates upon them. If there are adversary rights, they may be set up in opposition to the decree, or rather

Digitized by Google

in avoidance of it. Those who have such rights may put the widow to her ejectment, or other appropriate remedy, and in such proceeding the respective claims will be considered, in a great degree, as if no decree of the probate court had been pronounced. To explain, the decree will establish that she is the widow having right to dower out of the estate of the decedent; but whether the particular estate which is claimed adversely to the husband is subject to such right, is a question not determined by that court, except so far as the representatives of the husband are concerned, who are the only proper parties before the probate court. The widow claims through and under her husband, and if there be an outstanding title better than his at the time of his death, the decree of the probate court cannot defeat such title, or give her a preference over it. See *Farmers and Merchants Bank of Memphis* v. *Tappan*, 5 S. & M. 112; *Holloman* v. *Holloman*, MS.

The appearance of these parties in the probate court, and their contestation of the matters there, conferred no additional power on that court. Their rights must still remain as they were. Consent may give jurisdiction of the person, but not of the subject-matter, when, without such consent, the court would have no power to pronounce the judgment or decree.

The probate court was competent to inquire into the fact of the seisin of the husband. *Randolph* v. *Doss and Wife*, 3 How. 206. That fact, we think, was properly decided by it. The legal title draws to it the legal possession or seisin in law, unless there be an actual adverse possession. *Green* v. *Liter*, 8 Cr.; *Beekman* v. *Sellick*, 8 Johns. R. 262. Tillinghast's Adams on Eject. 10, note. There was here no evidence that the possession of Mrs. James was adverse to that of her brother, the decedent. Under the joint conveyance, the possession of one would be deemed the possession of both, unless there were evidence of an ouster. Till. Adams on Eject. 54; 14 Viner, 512; 7 T. R. 386. Our statute makes the estates of joint tenants liable to dower. H. & H. 357.

But if it be true that the purchase-money was paid by Mrs. James for the land, she may have a lien upon it for such pur-

Digitized by Google

chase-money. He might have been but a trustee for her, until it should be repaid. 4 Kent, 151; 5 Humphrey's R. 49; *Tompkins* v. *Mitchell*, 2 Rand. 428. This decree will not preclude that inquiry, nor any other which relates to the title of Mrs. James, or the other parties hereto, or of third persons, not the representatives of the husband.

This case is not in conflict with that of *Randolph* v. *Doss et ux.* 3 How. 206. There it is virtually stated that a paramount title, or the title of those not before the court, could not be affected by the decree.

Judgment of the court below affirmed.

Digitized by Google

Hugh H. Fultz *vs.* John F. House.

He who wishes to avail himself of a contract containing conditions precedent on his part to be performed, in pleading, must plead performance of those conditions precedent, and in making proof, must prove performance of them.

H. executed a deed of trust on certain slaves and other property to F. as trustee, to secure E. in the payment of certain notes due him by H. After the execution of the notes and deed of trust, H. and E. had an agreement, by which they arranged the terms of the settlement of the debt and deed of trust; part of those terms were, that H. by a day named, was to deliver up to E. the slaves named in the deed of trust; at the end of this agreement was this clause: "Whenever the above stipulations of compromise are complied with, it is to be a full settlement of all debts and demands of either party against the other, and a full release either at law or in equity." H. having failed to deliver the negroes to E. as stipulated, F., the trustee, brought an action of replevin against J. H., who had one of them in possession, for the slave; the court below instructed the jury on the trial of the replevin, that the agreement of compromise changed the title to the slaves out of F. the trustee, and vested it in E., who alone could recover: *Held*, that the instruction was erroneous; that no part of the agreement went into effect until H. had performed his condition precedent of delivering the slaves to E.

On appeal, from the Holmes circuit court; Hon. Morgan L. Fitch, judge.

In January, 1844, Hugh H. Fultz brought an action of replevin against John F. House, to recover possession of the slaves Silas, Nancy, Ann, Levi, Mary and her infant child. House gave bond for the forthcoming of the slaves, and a trial being had as upon issue joined, though no plea appeared in the record, a verdict was rendered for the defendant.

A bill of exceptions was signed upon the trial, from which the following facts in substance appear:

In support of the plaintiff's title, he read a deed of trust dated April 2, 1840, made by James Hurst of the first part, the plain-

Digitized by Google

tiff and James M. Dyer of the second part, and James R. Enloe of the third part, by which Hurst conveyed a tract of land, a number of slaves, including those in controversy, and other property, to Fultz and Dyer, as trustees, to secure to Enloe the payment of certain notes specified in the deed. A power of sale was given to the trustees, or either of them, in default of payment, and authority to take possession of the land and slaves for the purpose of sale. It was admitted that the slaves in controversy were portion of those embraced in the deed of trust, and had been in the county ever since the execution and record of the deed. The plaintiff here closed his case.

The defendant then read to the jury an agreement between Hurst and Enloe; the plaintiff objected to its introduction, but the objection being overruled, he excepted. That agreement was in these words, viz.:

"An agreement entered into between James Hurst and James R. Enloe, to compromise a certain suit now pending in the superior court of chancery, wherein said Hurst is complainant, and said Enloe and others are defendants, witnesseth, that the said Hurst is to pay and satisfy three judgments now pending in Holmes circuit court, one in favor of Nelson & Co. for about $300, including costs, interest and principal, up to this date; and one in which said Hurst was summoned as a garnishee, and had a judgment entered against him to the amount of about $200 interest, costs and all; and one in favor of Anderson Adams, for about $2400; and to pay off and satisfy in full a judgment in which said Hurst is bound as security in the forthcoming bond, to wit, the case of *Charles L. McGehe* v. *James R. Enloe*, and which said Hurst has enjoined, and which is now pending in the superior court of chancery of the state of Mississippi; and to return the negro man Solomon, heretofore sold to said Hurst by said Enloe, or to return one as valuable in his stead; and to return and redeliver to said Enloe all the other negroes and their increase, to the said Enloe on the 25th day of December, 1843; all of the stipulations of the above agreement are to be complied with by the 25th of December, 1843; and said Hurst

Digitized by Google

is to deliver said boy Washington, one of said negroes, forthwith.

"Said Enloe is to release said deed of trust, given by said Hurst to trustees for his use, so far as relates to the two hundred and thirty-seven acres of land, on which the improvement is situated, and to deliver up all of said notes, secured under said deed, and all other notes against said Hurst, except the one due in January, 1843, under which the lands, except the two hundred and thirty-seven acres, are to be sold by the trustees at the request of said Enloe; and if said land does not pay and satisfy said note, then the residue is to be returned to said Hurst, or credited as he may wish.

"Whenever the above stipulations of compromise are complied with, it is to be a full settlement and release of all debts and demands of either party against the other, and a full release either in law or equity."

This agreement was signed and sealed by the parties on the 10th day of December, 1842.

James Hurst, one of the parties to the above agreement, being first proved to be a certificated bankrupt, was introduced by the defendant, and testified that on the 4th day of January, 1844, he had settled with Enloe, in which settlement he paid him for the hire of the negroes and rent of the land, in the deed of trust, which were estimated from the time Hurst was declared a bankrupt. The witness also stated that this settlement was made with reference to a bill in chancery, before the Hon. Henry Dickinson, vice chancellor of the state. This bill in chancery, filed by Enloe against Hurst and others, was then read to the jury. It is not deemed requisite to notice the allegations of this bill further than to say, that they showed that Enloe had, in the first place, sold the land and slaves to Hurst, on which Hurst had executed the deed of trust to Fultz and Dyer, to secure the purchase-money.

Attached to this bill was an agreement by Enloe to dismiss it on Hurst making him certain payments. The plaintiff then offered to prove by Hurst, that Hurst had not paid any of the

Digitized by Google

notes secured by the deed of trust, or the payments specified in the agreements; the court below, however, refused to permit the question to be answered.

This being all the testimony in the cause, the defendant's counsel asked the court to instruct the jury, that if they believed from the testimony that James R. Enloe entered into an agreement with James Hurst to release the deed of trust, and that the agreement between said Enloe and Hurst is truly set forth in the written articles of date 10th of December, 1842, then such release discharged the trust deed, and the title to the said negroes vested in Enloe, and the plaintiff cannot maintain this action. To this instruction exception was taken, and the evidence embodied in the record.

On the rendition of the verdict and judgment for the defendant, the plaintiff appealed.

The following errors were assigned, viz.:

1. The court below erred in permitting the agreement entered into on the 10th day of December, 1842, which was to have been executed on the 25th day of December, 1843, and which was objected to by the plaintiff's counsel, to be read as evidence.

2. The court below erred in instructing the jury, that if they believed from the testimony that James R. Enloe entered into an agreement with James Hurst to release the deed of trust, and that the agreement between said Enloe and said Hurst was truly set forth in the written article dated the 10th day of December, 1842, that then such release discharged the trust deed, and that the title to said negroes vested in said Enloe, and that the plaintiff could not sustain the action.

3. The court below erred in refusing to permit the plaintiff to prove by the witness, James Hurst, that he, the said Hurst, had not paid either of the claims specified in said agreement, entered into on the 10th day of December, 1842, and in sustaining the objections raised by the defendant's counsel to the proving of the same.

James R. Enloe, for appellant.

1. On the first and second assignment of errors, cited the fol-

Digitized by Google

lowing authorities: 6 How. R. 187; Willis on Trustees, 206; Saunders on Uses and Trusts, 341, 363; 5 How. R. 742; Freeman's Ch. R. 105; *Jackson ex dem. Simmons* v. *Chase*, 2 Johns. R. 84; Jacob's Law Dic. Tit. Interest; Chitty on Contracts, 112; Leigh's Nisi Prius, 116, 682, 1470; Comyn on Contracts, 141, 142, 143, 146; 2 Black. Comm. 442, 443; 4 S. & M. 163; 9 Cow. R. 296; 7 Ibid. 290; 8 Johns. R. 96.

2. On the third assignment of errors, he cited 1 Phil. Ev. 57.

W. R. Miles, for appellee.

As the only claim the plaintiff relies on is derived from the deed of trust, and as that deed has been released so far as the negroes in controversy are concerned by the beneficiary, I am at a loss to know why this suit was brought, or why it is still pressed. By the compromise between James Hurst, the grantor in the deed of trust, and James R. Enloe, the beneficiary in it, the whole amount of the debt secured was extinguished, except one note, which by express stipulation was only reserved to effect a sale of the land. This arrangement unquestionably invested Enloe with title to the negroes, and divested the plaintiff of it.

The title of the plaintiff failing, the action was also compelled to fail. And it was thus rendered unnecessary for the defendant to show any title in himself, or to show how he had derived title.

There was no error in permitting the agreement entered into between Enloe and Hurst to be read to the jury.

That the instruction given by the circuit judge is the law, there can be no doubt.

Whether James Hurst paid the debts he agreed to pay when the compromise between himself and Enloe was made, makes no difference. That was a thing to be done in the future. The release took effect at the date of the compromise; and the court, therefore, did not err in refusing to hear proof of their non-payment.

It does not rest with the plaintiff to object that no plea was filed. He might have taken his judgment by default. But if

Digitized by Google

he failed to do this, and submitted the cause to the jury, and the verdict was found against him, he must abide his own action, and cannot now seek a reversal on that ground.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The plaintiff in error brought replevin for sundry slaves, and in support of his right to recover, introduced a deed made by James Hurst, which conveyed the slaves to the plaintiff as trustee to secure a debt due to Enloe. The title of the grantor was not controverted, but as a defence the defendant relied upon a settlement or compromise, entered into between Enloe the *cestui que trust*, and Hurst the grantor, which it is said discharged and extinguished the deed of trust, and vested the legal title to the slaves in Enloe, who should have been the plaintiff in the action, instead of Fultz, the trustee. The only question which it is material to consider, arises out of a charge given by the court at the request of defendant's counsel, in reference to the effect of this settlement.

It would seem that after the execution of the deed of trust, lawsuits had originated between Enloe and Hurst, in regard to this same property, and out of the original conveyance of it by Enloe to Hurst. The agreement of compromise was introduced by the defendant, and the court permitted it to be read, notwithstanding the objection of the plaintiff. The court then charged the jury, that if they believed Enloe had entered into an agreement with Hurst to release the deed of trust, and if the agreement between them was truly set forth in the article bearing date the 10th of December, 1842, then such release discharged the trust deed, vested the legal title in Enloe, and the plaintiff could not maintain this action. The propriety of this instruction depends upon the nature of the agreement.

It bears date the 10th of December, 1842, and professes to be an agreement to compromise a suit in chancery, instituted by Hurst against Enloe and others. Hurst was to pay certain judgments against Enloe; to return a negro man named Solomon, previously sold by Enloe to Hurst, or to substitute one as

Digitized by Google

valuable in his place, and to return and redeliver to Enloe all the other negroes and their increase, on the 25th of December, 1843. One of the negroes, however, was to be delivered forthwith. Enloe was to release the deed of trust given for his benefit by Hurst, so far as it related to two hundred and thirty-seven acres of land, to deliver up all the notes which had been given by Hurst except one, under which one, or for the satisfaction thereof, all the land except that agreed to be released, was to be sold by the trustees. At the end of this agreement there is this clause, to wit: "whenever the above stipulations of compromise are complied with, it is to be a full settlement of all debts and demands of either party against the other, and a full release, either in law or in equity."

We gather from the history of this transaction, as disclosed by the record, that the property conveyed in the deed of trust had been sold by Enloe to Hurst, and that the deed of trust had been given to secure the payment of the purchase-money. The legal title vested in the trustee. Passing over the question as to the power of the trustee to make a release, which would be sufficient in a court of law to change the legal title, it is perfectly manifest that the instrument was not intended to have that effect, without a compliance with its conditions on the part of Hurst. It was a compromise to take effect on the 25th of December, 1843, and then only on condition that Hurst should do what he had agreed to do, deliver up the negroes. This delivery constituted the consideration, the essence of the agreement. It was the inducement to the compromise. The last clause constitutes a condition precedent, that the settlement and release were only to take effect, when the stipulations of the compromise were complied with. The general rule here applies that he who wishes to avail himself of a contract containing conditions precedent on his part to be performed, in pleading must plead performance, and in making proof must prove performance. This contract was executory and conditional. Enloe had nothing to do but to deliver up the notes, and this he was not bound to do until Hurst delivered or tendered the

Digitized by Google

negroes. The charge then was predicated on a misconception of the legal effect of the contract of compromise. It was only an agreement to release the deed of trust upon condition to be performed by Hurst, and not a present release.

The judgment must be reversed and the cause remanded.

Digitized by Google

Isaac B. Lovelady and Elizabeth Lovelady *vs.* Daniel Harkins and Nancy Harkins.

An affidavit to procure an attachment, stating that the defendants "are concealing their effects so that the ordinary process of the law cannot be served on them, and that the claim against them will be defeated" &c., is sufficient.

If the process in attachment, by mistake of the justice, recited that the plaintiffs were concealing their effects, &c., instead of the defendants, and the bond and affidavit contained correct recitals, the court will look to the whole record, and not construe it so as to defeat its own end.

In error, from the circuit court of Lafayette county; Hon. James M. Howry, judge.

Isaac B. Lovelady and Elizabeth Lovelady made oath before a justice of the peace of Lafayette county, that "Daniel Harkins and Nancy Harkins were justly indebted to them in the sum of three hundred dollars or thereabouts, except some credits that belong to the note, which they do not recollect; and that they are informed, and believe said Daniel and Nancy Harkins are concealing their effects, so that the ordinary process of law cannot be served on them, and that their claim against them will be defeated, and this they believe to be true."

Bond having been duly executed, the justice issued an attachment, which was in the ordinary form, and was levied on a negro slave, as the property of the defendants therein, who gave a bond according to the statute to abide by the order of the court in the premises. At the return term of the court, the defendants moved to quash the attachment: 1st, because of a defect in the affidavit; the affiant swearing that the defendants were concealing their effects so that the ordinary process of law could not be served on them, and not that their claim against them would be defeated thereby. 2d. The facts alleged

Digitized by Google

in the affidavit were not stated to be true from the personal knowledge of the affiant, or that he is informed, or believes that they are true. 3d, The bond was defective because not joint. 4th, The writ of attachment was variant from the affidavit, in reciting that the plaintiffs were concealing, &c. The court below sustained the motion and quashed the attachment on the fourth ground alleged.

The plaintiffs excepted to the decision quashing the attachment, and in their bill of exceptions recite that it appeared in proof on the trial of the motion, that the attachment when issued and served, recited that the plaintiffs were concealing their effects &c.; and that after the service of the attachment, and before it was returned to the court, the justice who issued it, struck out the names of the plaintiffs, and inserted those of the defendants; so that the attachment on its face read properly. The plaintiffs prosecute this writ of error.

J. F. Cushman, for plaintiffs in error.

It is objected in this case that the affidavit of appellants is insufficient to sustain the attachment, because it does not pursue the exact words of either the attachment act of 1822 or 1844. The attachment act of 1844 is a supplement to the act of 1822, and thereby made a part of it; it is an extension of the judicial remedy by attachment, to cases not before embraced in the attachment act of our state. If then, the affidavit of appellants contains a sufficient recital of the substance of the two acts, which are really in contemplation of law, but one entire act, that is all that is essential, which it certainly does, for it was not required, even previous to the passage of the act of 1844, to incorporate in the affidavit for an attachment, more than the essential requisites of the statute; and it has been decided that it is not necessary to incorporate in the affidavit the exact words of the statute. See *Willis* v. *Wallace*, 6 How. R. 254.

The other point relied on by appellees, and upon which the court below sustained the motion to quash, is one of still smaller consequence, and indeed scarcely requires more than to

Digitized by Google

call the attention of the court to it to secure a reversal of the judgment below.

The omission of a proper name, if such omission existed, in the recital part of the attachment, after it had been properly inserted several times preceding and several times after, I do not believe can be regarded under our statute as a substantial defect. The statute is in these words: "No attachment shall abate for want of form, if the essential matters expressed in the foregoing precedents be set forth." This I conceive was done; but if the court should think differently, certainly the justice of the peace had a right to correct his own clerical error, for this can be regarded as nothing more in law. See *Park* v. *Crutcher*, 7 How. Rep. 243.

Taliaferro and *Hayes*, for defendants in error.

The attachment act of 1822, H. & H. 548, enables any creditor to sue out an attachment, by his making oath to the amount of his debt or demand; and that his debtor has removed, or is removing out of the state, so that the ordinary process of law cannot be served on him.

By the session acts of 1844, p. 126, the remedy by attachment is extended to all cases where an affirmation is made, that the debtors have concealed or are concealing their effects, so that the claim of the attaching creditors will be defeated, or cannot be made. And the facts upon which the application for attachment is predicated must be stated in the affidavit to be within the personal knowledge of the applicant, or that he is informed and believes the facts stated to be true. The affidavit in this case is neither in accordance to the act of 1844, or the act of 1822.

The act of 1844, on which the affidavit in this case must be presumed to be based, gives no right to the issuance of an attachment on the oath of a creditor, that his debtor is concealing his effects, so that the ordinary process of law cannot be served on him. If the object of an attachment be to secure the personal attendance of the debtor at the term of the court to which the writ of attachment is returnable, the concealing by

Digitized by Google

the debtor of his effects would not prevent the service on him of the ordinary process of law. If then it be true, that the debtors are concealing their effects, yet their appearance at the proper term of the court may be effected by the ordinary process of summons, as the debtors have not removed and are not removing out of the state.

The affidavit further states "and that their claim will be defeated." This certainly is an independent and distinct averment, and there is nothing showing its relation to "concealing their effects." The act requires that affidavit should be made that the debtors are concealing their effects, so that the claim of the attaching creditors will be defeated, or cannot be made. The mere concealing by the debtors of their effects, is not sufficient to justify an attachment; the claim of the creditors, according to their belief, must be about to be defeated thereby, or cannot be made.

The form of attachment prescribed by the act, makes it incumbent on the officer issuing the attachment, to recite the affidavit as made by the creditors. The recital in this case is, "That the attaching creditors are concealing their effects." Is it essential that this recital should be made? It must be so, as it is one of the matters recited in the form prescribed to prevent errors in issuing attachments. As well may be omitted the amount and character of the creditor's demand. The debtors ought to be apprized by the writ of attachment of all the essential matters contained in the affidavit of the creditors; it is therefore necessary that such recital be correct, and not vary from the affidavit. The bill of exceptions taken by the plaintiffs in error in this case shows that the writ of attachment was issued and levied with the recital; "that the plaintiffs are concealing their effects," and was changed by the officer issuing the attachment after issuance and levy, to read that the "defendants are concealing their effects." This the justice of the peace clearly had no right to do.

Mr. Justice CLAYTON delivered the opinion of the court.

This is an appeal from a judgment of the circuit court of Lafayette county, quashing an attachment sued out in the cause.

Digitized by Google

We have examined the objections, and do not find any of them sufficient to justify that measure. The order was made upon the fourth objection, in which it is said, "that the attachment varies from the affidavit, and recites that affidavit has been made that the plaintiffs are concealing their effects." This objection is not sustained by the record as sent to this court, and we can look to nothing else. The attachment recites that affidavit had been made that said Daniel Harkins and Nancy Harkins are concealing their effects so that their claim against them will be defeated, &c." Indeed, if such mis-recital existed, and the affidavit itself showed that the proper averment was made, and that it was a mere mistake of the justice who issued the attachment, we should look to the whole record, and not give it a construction which would defeat its own end. But it is not necessary to decide as to this, because the record does not disclose such fact.

The judgment will be reversed, and cause remanded.

Digitized by Google

WILLIAM D. HENRY *vs.* THOMAS B. HOOVER.

The plea of set off to an action of assumpsit does not exist in this state, and if pleaded is a nullity.

Under the statutes of this state, the right of set off exists, and may be made available under the plea of payment.

In an action of assumpsit the defendant plead a special plea of set off, which was the only plea pleaded. The plaintiff took issue upon it, and a verdict was rendered thereon, and judgment given accordingly: *Held*, that the mispleading was owned by the verdict, and that the verdict and judgment should not be disturbed.

IN error from the Madison circuit court; Hon John H. Rollins, judge.

Thomas B. Hoover sued William D. Henry in assumpsit upon a note. Henry plead the following plea: "*Actio non* because he says that the said plaintiff before and at the time of the commencement of this suit, was, and still is, indebted to the said defendant in a large sum of money, to wit; the sum of three hundred and fifty-four dollars and forty-nine cents, during the years, 1835, 1836, and 1837, for attending to the collection of divers large sums due to the plaintiff, in the state of Mississippi, at the special instance and request of the said plaintiff, and for work and labor, care and diligence and attention of the said defendant, before that time done and performed in and about the business of the said plaintiff and at his request, which said sum of money due and owing to the said defendant as aforesaid exceeds the damages sustained by the said plaintiff, by reason of the non-performance by the said defendant of the said several supposed promises and undertakings in the said declaration mentioned, and out of which said sum of money so due and owing by the said plaintiff to the said defendant, the said defendant is ready and willing, and hereby offers to set off and allow to the said plaintiff the full amount of the said damages,

Digitized by Google

according to the form of the statute in such case made and provided; and this the said defendant is ready to verify, wherefore, &c." To this plea the plaintiff replied denying his indebtedness, and the defendant joined in the issue thus presented. There were several mistrials, when at length the jury found for the plaintiff.

The defendant prosecutes this writ of error.

Mr. Justice THACHER delivered the opinion of the court.

Writ of error to the circuit court of Madison county. This was an action of assumpsit, to which a special plea of set-off only was filed, and upon which issue was taken.

It has been held by this court that the plea of set-off does not exist in this state, and, if pleaded, is a nullity. *Houston* v. *Smith*, 2 S. & M. 599. The principle of set-off was unknown at common law. It was introduced into the English practice by stat. 4 Anne, c. 17, and its application was subsequently enlarged by stat. 5 Geo. 2, c. 20. The right of set-off in the practice of this country is derived from the statutes of the different states, and the mode of availing of that right is also provided by their statutes. For instance, in Massachusetts, a set-off may be tried in all cases when any issue to the country is joined, without any plea; and in all actions, except assumpsit, in which an issue to the country is not otherwise formed, the defendant may plead that he does not owe the sum demanded by the plaintiff, which shall be deemed a good plea for the purpose of forming an issue upon which to try the defendant's demand in set-off. Rev. Code of Mass. 585, sec. 18. The statutes of England, which give the plea of set-off, not being in force in this state, and our statutes only giving the right of set-off, and not the plea, it remains to inquire under what form of plea we can exercise the right. A comparison of all the statutes of Mississippi which bear upon the subject, such as H. H. 589, sec 4, 590, sec. 7, and 615, sec. 5, indicate the plea of payment as the appropriate means of raising an issue upon which to try a demand in set-off, and the practice and decisions of this state have been in accordance with this conviction.

Digitized by Google

In this case, the plea of set-off having been a nullity, the response to the plea was likewise a nullity, and there was therefore, in contemplation of law, no issue joined. If we are to consider that no plea was filed, then it was irregular to proceed before a jury as on an issue. *Wilkinson* v. *Patterson*, 6 H. 193. But what is the result of having gone to trial on an issue to a plea of set-off? The defendant below cannot complain, because it was his plea; the plaintiff cannot complain, because he took issue. We are inclined to regard the plea as that kind of mispleading which is cured by the verdict under the statute; and, therefore, adjudge that the judgment below be affirmed.

Digitized by Google

JAMES R. McDOWELL *vs.* JAMES W. COOK.

If a third party take up a bill for the honor of the drawer, and at his request, at its maturity, he thereby releases the accommodation acceptor of such bill, whether he intended it or not.

In an action by M. against C., the acceptor of a bill drawn by B. in favor of R., and by R. indorsed to M., the court instructed the jury, that if they believed, from the evidence, that the plaintiff took up the bill at its maturity at the request of B., the drawer, and for his benefit, it was a payment of the bill, and they must find for the defendant, and that whether M. and B. intended to release the acceptor or not: *Held*, there being proof that C. was accommodation acceptor of B., that the charge was correct.

ERROR from the circuit court of Warren county; Hon. George Coalter, judge.

This was an action of assumpsit, brought by James R. McDowell against James W. Cook, on a bill of exchange drawn by James Bland on J. W. Cook & Co., and by them accepted, in favor of Church & Robb, and by them indorsed to the plaintiff. The declaration was in the usual form, and the defendant pleaded *non assumpsit*. At the trial, the plaintiff read in evidence to the jury the bill of exchange sued on, and rested his case. The defendant then read the answer of the plaintiff to a petition for a discovery, which admitted that he took up the bill of exchange sued on at its maturity, at the request of Bland, but denied that there was any understanding or agreement that J. W. Cook & Co. should be released, and the plaintiff look to Bland alone, for payment. The answer admits that Bland put some property in the possession of the plaintiff, but denies that it was to pay, or in any manner secure the bill of exchange sued on, and avers that it was intended to pay other debts due by Bland to the plaintiff, and that it did not pay those other debts by about $2800. The answer denies that the

Digitized by Google

plaintiff ever agreed to release, or was ever asked by any person to release J. W. Cook & Co.; that he supposed them to be acceptors for value, and he of course intended to look to them for payment. At the time the bill was taken up, it was distinctly understood between Bland and the plaintiff, that both acceptors and drawer should be held liable to the plaintiff for the money. The defendant also read a letter written by the plaintiff, in answer to a letter from Bland, in which the following language is used: "The payment of J. W. Cook & Co.'s acceptance when you get cotton out, will be satisfactory." P. W. Tompkins was then introduced as a witness on behalf of the defendant, and testified the bill of exchange sued on was given for goods furnished the witness, at the request of Bland, by Church & Robb, and that J. W. Cook & Co. were merely accommodation acceptors, who were assured by Bland at the time they accepted it, they should never be troubled with it. The plaintiff was not present when this assurance was given, and witness could not say whether the plaintiff knew that J. W. Cook & Co. were accommodation acceptors or not. This being all the evidence offered on either side, the court, on motion of the defendant, instructed the jury, "that if they believed the plaintiff took up the bill of exchange sued on at its maturity, at the request of Bland, and for his benefit, it was a payment of the bill, and they must find for the defendant;" and added, "whether McDowell & Bland intended, when the bill was taken up, to look to the acceptors for payment, or release them or not, if the plaintiff took it up at Bland's request, and for his benefit, the bill was discharged, and the defendant released." The jury found for the defendant, and plaintiff moved for a new trial. 1st, because the verdict of the jury was contrary to the evidence, and 2d, because the court erred in the charge to the jury. The court overruled the motion for a new trial, and the plaintiff has brought the case to this court by a writ of error.

Smedes and *Marshall*, for the plaintiff in error.

We think the judgment below should be reversed, because

Digitized by Google

the instruction of the court was too broad, and calculated to mislead the jury, and because the court erred in refusing to grant a new trial. It is manifest, from the evidence, that the plaintiff, when he took up the bill of exchange sued on, did not intend to pay it, or release any of the parties on it; indeed, he states in his answer to the petition for a discovery, and that is the only evidence offered of the payment of the bill, that it was expressly understood that he should look for payment to the acceptors as well as drawers. But according to the opinion of the court below, it was wholly immaterial what his intentions or understanding with Bland may have been when he took up the bill, provided it was taken up at the request of Bland. In this opinion we contend lies the error of the court below. If McDowell did not intend to give credit to Bland, and pay off the bill for him, and it is positively proven he did not, he became the purchaser of the bill when it was indorsed to him by Church & Robb, and thereby acquired all the rights, and became entitled to all the remedies which they possessed before the indorsement. Suppose, in his answer to the petition for a discovery, the plaintiff had used the words "purchased the bill," instead of the words "took up the bill," no one could have doubted his right to sue and recover on the bill either against the drawers or acceptors. And that too, whether he purchased at the request of Bland or not. Or suppose J. W. Cook & Co. had in fact been, as McDowell believed they were, acceptors for value, would he not clearly have had a right of action against them on the bill, no matter at whose request he purchased or took it up? If McDowell intended to pay the bill for Bland, and thereby discharge the acceptors, why, we ask, was it indorsed by Church & Robb to him instead of delivering it up to Bland? The indorsement is *prima facie* evidence of a purchase of the bill, and all the circumstances in the case we think tend to corroborate, rather than rebut that presumption, notwithstanding the plaintiff in his answer uses the words "took up the bill." The fact of Cook & Co. being accommodation acceptors, ought not, and cannot prejudice the plaintiff's rights. By accepting the bill they acknowledged to the plaintiff and the world that

Digitized by Google

they had funds of the drawer in their hands, and that they would pay the amount of the bill to whoever might become the legal holder of it. The plaintiff swears he believed the acceptors were the real debtors, and there is no evidence conducing even to prove he knew they were not. Must they not then be treated, so far as he is concerned, as the real debtors, whether they were in fact accommodation acceptors or not? If this view of the case be correct, there was no evidence whatever to support the verdict of the jury,

George S. Yerger, for defendant in error.

The court charged the jury in accordance with the law, "that if they believe McDowell paid the bill at the instance and request of Bland, and for his benefit, the bill was paid, and the acceptor discharged."

The jury found for the defendant.

I see no error; the bill was paid at the instance of Bland. Any agreement they could make that McDowell should pay the bill, and hold the acceptors notwithstanding liable, where it was an accommodation bill, would not be sufficient to keep it alive. Payment of the bill by any person is a discharge.

The jury found according to weight of evidence, and the evidence should be strong to induce this court to set it aside.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action brought by McDowell as an indorser of a bill of exchange drawn by James Bland and accepted by Cook. The acceptance was without consideration, and for the accommodation of Bland. The bill was taken up at maturity by McDowell at the request of Bland. The sole question grows out of the charge of the court to the jury upon the trial. That charge was as follows: "That if they believed from the evidence that the plaintiff took up the bill at its maturity at the request of Bland, the drawer, and for his benefit, it was a payment of the bill, and they must find for the defendant, and this whether McDowell and Bland intended to release the acceptor or not."

Digitized by Google

This charge lays down the law quite as favorably for the plaintiff, as is warranted by the authorities. Chitty thus states it: "If a person take up a bill for the honor of the drawer, he has no right of action against the acceptor, if he accepted it for the accommodation of the drawer." Ch. on Bills, 542. The same rule is laid down in *Ex parte Lambert*, 13 Ves. 179; and the reason is given, that if the drawer had taken it up himself, no action would lie upon it, and a third person taking it up for him must occupy the same position.

The judgment below was for the defendant, and the same is affirmed.

Digitized by Google

ASAHEL W. WASHBURN et UXOR *vs.* WILLIAM PHILLIPS et al.

A suit upon an administrator's bond cannot be maintained in the probate court. The remedy thereon is at law.

The application to the probate court to have an administrator's bond declared forfeited, and for leave to put it in suit, is intended by the statute to be *ex parte* in its character; and the sureties on the bond have no right to contest their liability in that stage of the proceeding.

As a general rule the probate court should, on application, allow the administrator's bond to be put in suit; the instances are few in which the leave should be refused.

W. and others, distributees of the estate of M., filed a bill in the probate court against P. and others as the sureties of S. M. on her administration bond of M's. estate, S. M. having intermarried with one B. and removed with the property of the intestate out of the state. The object of the bill was to compel B. and his wife to account for the property; the amount due the complainants to be decreed to them, and the bond declared forfeited and put in suit; P. plead that by a former decree of the probate court, a proceeding against him as administrator of M., which office he once filled conjointly with S. M. but had afterwards resigned, for the same matter and to the same effect with the present, had been dismissed by the court; this plea was sustained by the court below, and the bill dismissed as to P.: *Held*, that the plea was improperly sustained; P. having in the two proceedings been impleaded in different characters, in one as administrator and in the other as a surety of the administratrix.

Where an administrator has left the state with the property of his intestate, can the distributees of the estate proceed by publication to make such absent administrator a party to a proceeding in the probate court by bill, for an account of his indebtedness to the estate, and to have his bond put in suit against the sureties? *Quære?*

Is not a bill in the probate court by the distributees of an estate, against an administrator and his sureties on his official bond, to have an account of what is due by the administrator taken and to have his official bond declared forfeited and put in suit, liable to demurrer for multiplicity of parties? *Quære?*

In plenary proceedings by bill in the probate court against an administrator, it is premature to enter a decree without taking the bill for confessed.

Digitized by Google

On appeal from the probate court of Yazoo county; Hon. James R. Burrus, judge.

Asahel W. Washburn and wife Leonora, and William E. Pugh, administrator of Rhoda Martin, deceased, filed their bill stating, that in 1837 Moultree Martin died intestate, possessed of a large amount of personal property, leaving surviving him Susan Martin, his wife, Leonora Martin, who has since intermarried with the complainant Washburn, Rhoda Martin, who has since died intestate, upon whose estate the complainant Pugh had administered, and Joseph and Adeline Martin, minors, for whom Washington Dorsey was guardian. That at the December term, 1837, of Yazoo probate court, letters of administration on the estate of the said Moultree were granted to Susan Martin and William Phillips, who took into their possession the personal estate of the said Moultree. That at the January term, 1839, of said probate court, Phillips surrendered his letters of administration, and left Susan Martin sole administratrix, and in possession of the property.

That some time in the year 1838 or 1839, the said Susan intermarried with one David Barber; that neither the said Phillips and Susan, while joint administrators, or the said Susan, while sole administratrix, nor Barber, after he married the said Susan, had accounted with the probate court, or any person for the personal estate of the said Moultree Martin, but had appropriated the same to their own use. That since the intermarriage of the said Susan with Barber, they had removed from the state, leaving none of the personal property of the said Moultree behind them; that the said Susan gave as securities on her administration bond the said Phillips, Alexander H. Murphy and Andrew Gibbs; that complainants are distributees of said estate, and that they are remediless unless through that court.

The bill prays that Barber and wife, Phillips, Murphy and Gibbs, and the said Joseph and Adeline, by their guardian, be made parties defendants; that Barber and wife be compelled to account for all of the personal estate of the said Moultree, which came to the hands of the said Susan while sole administratrix, and for all which came to the hands of the said Barber after the

Digitized by Google

marriage; and that the court will render a decree for what sum may be found due the estate, and will appropriate the same to the distributees as they are entitled by law, and will declare the bond of the said Susan, as administratrix as aforesaid, forfeited, and order the same in suit and for general relief.

To this bill the defendant, Phillips, one of the sureties on the administration-bond of the said Susan, pleads in substance as follows: That prior to the filing of this bill, to wit, on the 27th February, 1843, the said complainants, with Joseph and Adeline Martin, by their guardian, did file their bill or petition in said probate court, for the same matter and to the same effect as the said bill now does set forth; to which bill the defendant did put in his answer, denying that he was in any manner liable as administrator of Moultree, Martin, &c.; and avers that such proceedings were thereupon had in said suit that afterwards the said cause came on to be heard before the said court, upon final hearing, and was heard upon its merits; and that the said court determined that the defendant was not in any way liable as the administrator of said Moultree, or upon the administration-bond executed by him and others as set forth in the pleadings, which bond was the same set forth in this bill; and further avers, that the court, by its decree, did finally dismiss the aforesaid bill or petition, which decree is still in force, and therefore he pleads the said former bill, answer, proceedings, and decree in bar of the said complainants' present bill, &c., prays judgment, &c. To which plea the complainants replied, that the material allegations and averments, set forth in the plea of the said Phillips, are not true as set forth in said plea, and this they are ready to verify by the record, &c.

The bill which is plead in bar is spread out in the record, and is in substance as follows:

A. W. Washburn and wife Leonora, Joseph Martin and Adeline Martin, by their guardian Washington Dorsey, and William E. Pugh, administrator of Rhoda Martin, allege, that in 1837 Moultree Martin died, leaving surviving him the complainants and Susan C. Martin, (who has since married David Barber,) his wife, his heirs at law. That at the December term, 1837,

Digitized by Google

of Yazoo probate court, letters of administration on the estate of the said Moultree were granted to the said Susan Martin, now Susan Barber, and William Phillips, who gave bond with A. H. Murphy and Andrew Gibbs, their sureties; that they took into their possession the personal estate of the said Moultree, and the said Phillips made an inventory, for which he has in no manner accounted; that at the January term, 1839, said Phillips made his final settlement, in which he shows that he had paid debts to the amount of $2195 31, and that he had received of the rights and credits $1688 65.

The bill then prays that the said bond may be declared forfeited, and ordered to be put in suit for the benefit of all concerned; and that the court will compel the said William Phillips to account for all the property, of every kind whatsoever, which came to his hands as administrator of the said Moultree Martin, and that the court would enter up a decree against the said William Phillips, as aforesaid, &c., and for general relief.

To which bill the said William Phillips filed his answer, in substance as follows: He admits the death of Moultree Martin, as stated, and that the complainants and Susan E. Martin, now Barber, are his heirs at law; admits the granting of letters of administration on said estate to the said Susan and himself as stated, but does not recollect that he ever rendered any inventory of said estate, but says the paper filed and called an inventory was an appraisement; does not know who filed this paper in court; has no recollection he did, and insists on proof; admits the property mentioned in it was the property of Moultree Martin, but denies he took it into possession, unless the following facts constitute possession: — At the death of said Moultree, his widow before administration had all the property in her possession; after the grant of letters to the widow and himself, she still retained the same in her possession; never had it in his individual possession, nor under his control; that he never considered himself responsible for said property; that he considered his co-administratrix as much entitled to possession as he was, and that each was liable for his own acts. Under this belief he presented his accounts for settlement, as stated in said bill, and

Digitized by Google

the said court passed upon and allowed them. That upon said final settlement, he was discharged from his office as administrator, and he has had nothing to do with said estate since, nor after that was he entitled to the possession of said slaves and other property mentioned in said appraisement, but the same was then in the possession of his co-administratrix and her husband, Barber, and being in possession, said Barber removed said property to parts unknown, and what has become of it this respondent does not know. He relied as a bar to said petition upon the order and decree of said probate court as aforesaid, and insists that the same is final and conclusive. He submits whether he is responsible for the acts of Barber and wife, since his discharge aforesaid from his administration, and for the acts of said Susan before her marriage with the said Barber; and whether said final settlement and discharge is not conclusive that he is not liable to complainants, &c., and prays to be dismissed.

Upon this answer and proofs, the court dismissed this bill with costs, and made the following order:

"*A. W. Washburn and wife Leonora, Joseph and Adeline Martin, by Washington Dorsey, guardian, William E. Pugh, administrator of Rhoda Martin*, against *William Phillips, administrator of Moultree Martin*:—

This cause coming on, &c. it is ordered, adjudged and decreed, that the bill or petition of petitioners be dismissed; and it is further ordered, that the defendant recover his costs, &c."

On the trial of the present cause upon this plea of the defendant, the court below sustained the plea and dismissed the bill as to Phillips, the security, and directed the clerk to take an account of the transactions of Barber and wife, and ordered the bond forfeited as to the others.

An order of publication was made against Barber and wife, and the proof of publication filed; but the bill was not taken for confessed either as against them or the other defendants who did not answer. The complainants prosecute this appeal.

Digitized by Google

W. E. Pugh, for appellants.

The only question which arises for the consideration of this court is, was the dismissal of the bill filed by Washburn et als. against William Phillips, as administrator of Moultree Martin, a bar to the recovery on the bill filed by complainants against Barber and wife, as administrators of Moultree Martin? Most clearly not.

Phillips and Susan Martin administered on the estate of Moultree Martin. Susan married Barber, and Phillips resigned his letters. The complainants filed their bill to compel Phillips to account; he shows that he had accounted, and if he ever had the negroes in his possession, he delivered them over to Barber in right of his wife, who was administratrix, and thus discharges himself from responsibility; upon which showing, the court dismisses the bill. The complainants, finding that Phillips had paid over to Barber and wife, or Susan Martin, administratrix, files their bill against them, and makes the securities to the bond of Susan Martin (now Barber) parties defendants, among whom William Phillips, the former administrator, happens to be one of the securities. Phillips comes in and pleads a former judgment in bar. Upon the inspection of the former record, which is plead in bar, Phillips alone is sued as administrator, and not Barber and wife, and Phillips only notified as a security on her bond. Upon the facts in this cause I cannot see any pretence upon which to sustain the judgment of the court below, and feel confident this court will not hesitate to reverse it.

George S. Yerger, for appellees.

In this case, the issue having been found on the plea of former decree, as it was obliged to be, from the record of the previous proceeding, I see no reason why this court should reverse the decree. If the former decree was wrong or erroneous, they might have brought it up for revision, but they did not; it still is in full force and effect, and being so, was properly pleaded.

Whether the first case was or was not correctly decided, cannot now be examined; the question was settled. The case was

Digitized by Google

however decided right. The case in Hopkins's Reports is clear, and the act of assembly authorizing the discharge of company administrators, &c. shows such to be the law of Mississippi. H. & H. 416, sec. 106.

Mr. Justice CLAYTON delivered the opinion of the court.

This was a bill filed by the appellants in the probate court of Yazoo county, stating that they are distributees of the estate of Moultree Martin, deceased; that William Phillips and Susan Martin administered on the same; that Phillips afterwards surrendered the trust, and was discharged by the court, and that thenceforward Susan Martin was sole administratrix, until her marriage with the defendant, David Barber. That they have removed themselves, and all the property of the decedent out of the state. That the said Phillips, Alexander H. Murphy and Andrew Gibbs, are her sureties in the administration-bond; prays that said Barber and wife may be made parties by publication; that they be compelled to account, and the amount due to complainants decreed to them, that the bond may be declared forfeited and put in suit for their benefit.

Phillips appeared and filed a separate plea to the bill, alleging in substance that the present complainants, together with others, formerly filed a bill in the same court, for the same matter, and to the same effect, against the defendant Phillips, and that upon full and final hearing the same was dismissed by the court. This plea was sustained by the court, and the bill dismissed as to Phillips, but retained as to the other parties, and the bond directed to be put in suit as against them.

The proceeding, which is thus pleaded in bar of the present bill, is made a part of this record. It is against Phillips as administrator, and seems to require, though it is not very easy to determine what it does require, that he should be compelled to settle his account as administrator, and that for any balance which might be due from him, a decree should be rendered, and that the bond for the administration should be declared forfeited, and directed to be put in suit. On the hearing, it appeared that the estate was in debt to Phillips, and the bill was therefore dismissed.

Digitized by Google

It is very manifest that Phillips is now before the court in a different attitude and capacity from that in which he appeared on the former occasion. Then he was a party as administrator in a course of proceeding entirely legitimate; now he is brought before the court as a surety in an administration-bond, for what purpose we are not given to understand. It is certainly the law, that a suit upon the bond cannot be maintained in the probate court. *Green* v. *Tunstall*, 5 How. 638. Why he and the other sureties were made parties to the bill we do not know, for no decree can be rendered against them. The remedy upon the bond is at law. The application to have the bond declared forfeited, and for leave to put it in suit, is intended by the statute to be *ex parte* in its character, and the sureties have no right to contest their liability in that stage of the proceeding. It is a mere preliminary step, with which they have no right to interfere. The instances are few in which the leave should be refused.

The plea of Phillips was improperly sustained, and the order of the court must therefore be reversed.

The decree goes on to direct, that as to all the parties except Phillips the bill should be retained; that the clerk take an account of the transactions of the administrators, and that the bond be declared forfeited and put in suit. There was no order of the court taking the bill for confessed, nor was there any appearance as to the other parties. The bill seems intended to make a regular plenary proceeding by bill; it was therefore premature to enter a decree without taking the bill for confessed. H. & H. 472.

It may be doubted whether the probate court, in a case like this, is authorized to proceed by publication. The question may be asked, too, if the bill be not liable to demurrer for multiplicity of parties. On these points we give no opinion.

The decree of the court will be reversed, the plea of Phillips disallowed, and the cause remanded to stand as it did before the plea was filed.

Decree reversed.

Digitized by Google

JAMES C. RUPERT *vs.* REUBEN H. GRANT et al.

A commission which issues from the office of the circuit clerk, for the purpose of taking a deposition, which does not contain the name of any commissioner at the time it issued from the clerk's office, will be irregular, and the deposition taken under it must be excluded.

Where a deposition had been excluded from the jury on the ground that the commission under which it was taken was irregular in not having the name of the commissioner in it when it issued, the party who took the deposition cannot obtain a new trial on the ground of surprise, in the exclusion of the deposition, as that exclusion was owing to his own laches in irregularly suing out the commission.

In an action against the indorser of a bill of exchange, it was proved that the holder of the bill, after its maturity, received ten per cent. of its amount from the acceptor, and in consideration thereof agreed to wait until the drawer of the bill could be heard from, though the witness who testified to the agreement did not recollect that any definite time of payment of the balance due on the bill had been agreed on: *Held*, that the indulgence granted to the acceptor until the drawer could be heard from, based upon a sufficient consideration, exonerated the indorser.

ON appeal from the circuit court of Noxubee county; Hon. Hendley S. Bennett, judge.

James C. Rupert sued Reuben H. Grant and Thomas D. Wooldridge, upon two bills of exchange drawn by Grant in favor of and indorsed by Wooldridge, upon and accepted by Andrews & Purvis. They were indorsed to H. B. Gwathney, who had indorsed them to the plaintiff. The defendants plead *non assumpsit*, and upon the trial the jury found for the plaintiff as against Grant, but found for the defendant Wooldridge.

By the bill of exceptions it appears that the plaintiff proved demand and notice to the drawer and indorser, according to law. The defendant then read the deposition of Warren S. Andrews, taken on the 4th of April, 1843; who proved that

Digitized by Google

Purvis & Andrews accepted the bills while in Gwathney's possession, to whom they supposed they belonged; that about the time of their maturity the witness called on Gwathney, and informed him that Purvis & Andrews would not be able to take them up, but that they were daily in expectation of hearing from the drawer, and expected to be put in funds by him to meet them; that on the 4th of January, 1840, Purvis & Andrews paid Gwathney ten per cent. on the amount of the bills of exchange; what understanding there was between Gwathney and the witness in relation to the time of payment of the balance he did not recollect, but thinks it was indefinite further than the time it should be received from Grant. On cross-examination he stated, that there was no consideration given by Purvis & Andrews further than the ten per cent. He did not think there was any time fixed for the payment of the balance due on the bills; that Purvis & Andrews had never been put in possession of funds to meet the bills of exchange.

On the 26th of March, 1844, a second deposition of Andrews was taken, which was read by the plaintiff. In this last deposition he states that Purvis & Andrews paid ten per cent. on the bills of exchange, but he did not recollect that any specified time was agreed by them and Gwathney for the payment of the balance due; that it had been a long time since the transaction took place, and if any specified time was agreed on he did not then recollect it; that the ten per cent. was paid as before stated, but that he had no recollection of any agreement between the parties for the payment of the balance in thirty days, or any specified time. On cross-examination he stated that he knew of no agreement between the holder of the bill and Purvis & Andrews, by which they were to be exempt from being sued or any remedies at law be suspended against them; that Purvis & Andrews were the accommodation acceptors of the drawer.

The plaintiff then offered to read to the jury the deposition of H. B. Gwathney, which was objected to by the defendant's counsel, because the names of the commissioners to take the deposition was not inserted by the clerk of the court, but the commission issued in blank and the name of the commissioners

Digitized by Google

were filled up in Virginia. On proof of these facts the court rejected the deposition.

After the verdict as stated, the plaintiff moved for a new trial as to Wooldridge, on the grounds, 1. That the verdict was contrary to evidence. 2. That the plaintiff had been surprised by the deposition of Gwathney being ruled out. He accompanied the motion with an affidavit that he could prove by Gwathney that no time or indulgence had been at any time granted to the acceptors, and that Gwathney was never really the owner of the bills, but that they had been indorsed to him merely for collection, as the agent of the plaintiff; and that he had no knowledge at the time of the trial that the deposition had been irregularly taken; that Gwathney resided at Mobile. The court took the motion under advisement, and in vacation delivered an opinion overruling the motion. From that opinion the plaintiff below appealed.

A. C. Baine, for appellant.

1. In deciding the supposed preliminary point in this case upon the authority of the case of *Smith* v. *The Natchez Steamboat Company*, we think the court erred. The facts in that case are wholly inapplicable to this. There the defect in the deposition arose from the party's own violation of law, in proceeding to take a deposition before he had complied with the precedent conditions of the law which authorized him to take it. Here the defect arose from the act of the clerk in issuing the commission. And if an error at all, it was the error of the clerk, and not of the party. The law gives the party no supervisory power over the clerk. It is his single and official duty. Upon its face it appeared to be well done, and it was only by proving acts which falsified its face, that made it bad, if bad at all. And we respectfully suggest that parol proof, unaccompanied with any suggestion of fraud, was wholly incompetent for the purpose of contradicting the commission. There can be no reason, if this can be done, why any record or exemplification of one, when offered as evidence, may not be contradicted and made invalid by similar proof. This would certainly destroy and sweep

Digitized by Google

away from any party all his just expectations at the moment of trial. This view, taken in connection with the first, seems to me to be sufficient to reverse the judgment of the court below. It is decided in *Gilpins* v. *Consequa*, Peters's C. C. R., that "those who execute a commission are appointed by the court, and although they may be named by their parties, they are not their agents." See 1 Phillips's Notes, 35.

However the court may settle the law as to the right of the clerk to inclose a commission in blank, for the name of the commissioner, we think the judge erred in not granting a new trial for the reasons above stated. The course, however, is very convenient, and has generally been adopted in practice, and I have never heard of any evils that have actually accrued or are likely to accrue; and can therefore see no reason for the judgment of the court on this point.

2. In relation to the merits, we think the proof entirely too slender to discharge the indorser. It establishes neither of the four requisites necessary to that purpose. First, a consideration for the promise to indulge. Second, a promise to indulge. Third, a promise not altogether indefinite. Fourth, that the surety has not assented. 4 How. 692. Here was ten per cent. paid, but there is not the slightest evidence that it was paid for a promise to indulge. The evidence is just as strong that it was altogether voluntary, indeed it is stronger. And there must be a preponderance of proof in all cases. And mere preponderance is insufficient to destroy a right once admitted to exist. Preponderance of proof "is insufficient in all cases where it falls short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law." 1 Starkie's Ev. part 3, sec. 53. Now we think there is not even a preponderance of testimony here. But if there be, there is certainly not that full proof this law requires. And the same reasoning applies to the next point, "the promise itself." And so on to the rest, which the court will readily apply in the investigation of the cause.

Granting the proof to be full, however, it is suggested on the authority of *Bullit et al.* v. *Thatcher et al.*, 5 How. 694, that

Digitized by Google

the rule of discharging a surety, upon a sufficient contract for delay, does not apply to an indorser. His contract is a separate, distinct and individual liability. His duty is plain, if the drawer does not take up the paper, it is his duty to do so immediately. And to hear him urging this defence, is to listen to his own violation of contract, as a reason for discharging him from its obligations. Again, if the proof ruled out be admitted, it will prove the contract — if made for delay, was made by an agent without authority, and therefore void.

John D. Freeman, for appellees.

By the agreement in this case the holder was disabled from suing the acceptors until the happening of a certain contingency.

If a holder disables himself for a moment from suing, he releases all parties to the bill not privy to such grant of indulgence. Bayley on Bills, 191, note 90; H. 357, notes 20, 21, 358, note *u*.

When a new credit is given, the party holding takes it upon himself; and in no case when the holder gives time for payment to the maker is the indorser liable. 1 Bay, 177, 178; 16 Johns. 70; 9 Cowen, 194.

The jury found a verdict discharging Wooldridge, the indorser, and the plaintiff moves for a new trial, which was refused, and this is the error assigned. The evidence, when properly understood, is not conflicting, but even if it were, it is the province of a jury to decide on such cases, and the court will not disturb the verdict unless the same is clearly contrary to law. Graham on New Trials, 326, *et seq.*

The deposition of Gwathney was properly ruled out for irregularity in taking the same. 1 How. 495. In order to get a new trial on the ground of surprise, the surprise must be such as care and prudence could not provide against. The slightest negligence will defeat the application. Graham on New Trials, 174. The defect of the deposition was the neglect of the plaintiff, and he cannot set up his own neglect for a new trial; besides, Gwathney is liable to Rupert as last indorser to Rupert,

Digitized by Google

and his interest is to make Wooldridge liable in order to avoid the payment of the bill himself. Hence his evidence could not be heard and the affidavit for new trial is insufficient, inasmuch as it sets up no newly discovered evidence. 15 Johns. 293.

Mr. Justice THACHER delivered the opinion of the court.

Appeal from the circuit court of Noxubee county.

Rupert instituted an action against Grant, as drawer, and Wooldridge as indorser, of two bills of exchange. Verdict and judgment against Grant and in favor of Wooldridge.

The material facts disclosed by means of a motion for a new trial are that the deposition of Gwathney, an indorser of the bills of exchange, was ruled out of the evidence, and that the jury based their verdict as to Wooldridge upon the supposition that Andrews, whose depositions were read upon the trial, proved that Gwathney, who was the holder of the bills at their maturity, gave time to the acceptors of the bills after their maturity, and without the consent of the defendants.

The deposition of Gwathney, procured by the plaintiff, was proved not to have contained the name of any commissioner at the time it issued from the circuit court. This was irregular, as the commissioner derives his authority by the special appointment of the court, and is thereby constituted an officer of the court to the extent of his commission. H. & H. 603, sec. 16. *Doe ex dem. Martin* v. *King's Heirs.* 3 H. 141. The deposition was therefore properly ruled out. The action of the circuit court in reference to this deposition was not a good ground for a new trial on the score of the party's surprise. He should have been prepared for trial, and it was his own laches that the commission was irregularly sent out. The clerk of the circuit court was subject to his directions so far as in accordance with the statute. *Smith* v. *The Natchez Steamboat Co.* 1 H. 495.

Two depositions were taken from Andrews. One, taken on the 4th day of April, 1843, was offered in evidence by the defendants; and the other, taken on the 26th day of March, 1844, was offered in evidence by the plaintiff. The first deposition of Andrews establishes, that, at about the time of the maturity of

Digitized by Google

the bills, he called upon Gwathney, then their holder, and informed him that the acceptors would not be able to take them up, but that they were in daily expectation of hearing from the drawer, and expected to receive from him the funds by which to meet the bills; that on the 4th day of January, 1840, the acceptors paid Gwathney ten per cent. on the amount of the bills; that he did not recollect what understanding was had with Gwathney "in relation to the time for the balance, but thinks it was indefinite further than the time it should be received from" the drawer; and that he has no recollection of any definite time of payment having been agreed upon. The second deposition contains the same statement in regard to the payment of the ten per cent. on the amount of the bills, and states that the witness has no recollection of any "specified time" having been agreed upon for the payment of the balance due on the bills.

There is no discrepancy in the two depositions in regard to the facts, although the second is not as full as the first. Both of them establish that no particular extent of time was agreed upon for delay in the payment; but the first establishes the fact that a delay was granted, at least until something could be heard from the drawer, but how much longer was left indefinite. There seems to have been enough to warrant the jury in their finding for the indorser. There was a promise upon a consideration; that promise of indulgence was definite, at least to a certain extent, and was granted without the assent of the indorser. The circumstances seem amply to warrant the view adopted by the court below in declining to grant a new trial, and to warrant the opinion of this court as previously promulgated. *Newell & Pierce* v. *Hamer et al.* 4 H. 692.

Judgment affirmed.

Digitized by Google

CORNELIUS VANHOUTEN *vs.* JOHN G. REILY and HENRY CAGE, Administrators of Samuel Reily, deceased.

A judgment may be assigned by the judgment creditor to a third party; by such assignment the beneficial interest in the judgment will pass to the assignee, who will have the right to use the name of the judgment creditor to enforce the execution.

Where a judgment has been obtained against the administrators of a deceased person, and they, without paying the judgment, proceed to distribute the deceased's property among his legal distributees, until it is all divided, the judgment creditor may levy his execution on any of the property thus distributed; and that too though the judgment should be assigned, and at the time of the levy belong to one of the distributees.

In such case, though there might be equities among the several distributees, as to the proportions in which they shall contribute to the payment of the claim, those equities cannot be settled in a court of law on a motion to quash the execution.

IN error, from the circuit court of Wilkinson county; Hon. C. C. Cage, judge.

On the 20th November, 1833, Cornelius Vanhouten recovered judgment, in the circuit court of Wilkinson county, against John G. Reily and Henry Cage, administrators of Samuel Reily, deceased, for the sum of $829 60. The administrators prosecuted an appeal to the high court of errors and appeals; and at the January term, 1840, of that court, the judgment of the court below was affirmed, with damages and costs, &c.

An execution issued on this judgment, thus affirmed; and on the 1st August, 1843, was levied on a slave named Nero, as the property of Samuel Reily, which was claimed and replevied by Peter A. Presler, administrator of James Varnell, deceased, who gave bond to try the right of property.

At the October term, 1843, of the court, Presler, administrator, &c., and claimant of the property levied upon, moved the

Digitized by Google

court to quash the execution, for the following grounds, among others:

1. Because the *fi. fa.* was satisfied as to Cornelius Vanhouten.

2. Because the judgment on which said *fi. fa.* issued, had been taken up by one John M. Deloach, who, in right of his wife, one of the daughters and heirs of said Samuel Reily, deceased, had in his possession as such, a large amount of the property received by his wife by inheritance from her father's estate, by distribution.

3. Because said *fi. fa.* has been irregularly issued, &c.

The facts exhibited before the court below, on the motion to quash, were substantially as follows, viz.:

The judgment against Samuel Reily's administrators in favor of Vanhouten, was founded upon a debt due by the intestate in his lifetime. Before the affirmance of this judgment the property of the intestate was distributed to his heirs, ten in number. On the 1st June, 1841, Vanhouten, for a valuable consideration, transferred the judgment to Deloach, in these words: "I, Cornelius Vanhouten, for, and in consideration of the sum of $1509 44, have, and do hereby assign, transfer, and set over unto John M. Deloach, all right, claim and interest whatever, that I have in and to a certain judgment at law, obtained in the circuit court of the county and state aforesaid, on 20th November, 1833, for the sum $827 60; $82 70, damages, &c. And I, Cornelius Vanhouten, plaintiff in said judgment, do fully authorize the said Deloach to control the said judgment in such manner as he may see fit. And I do hereby fully ratify and confirm unto the said John M. Deloach, his heirs and assigns, all my interest and claim in said judgment."

It further appeared, from the record, that John M. Deloach, in 1839, intermarried with one of the distributees of said Reily's estate, and had, at the time of taking the assignment of said judgment, a number of negroes, the property of the said estate, in his possession, &c. The court below quashed the execution, and Deloach excepted, and prosecuted this writ of error.

Digitized by Google

Simrall, for plaintiff in error.

We presume there is no doubt that a plaintiff can, in good faith, and for a valuable consideration, assign his judgment so as to invest his assignee with all of the rights to the control and fruits of the judgment.

Did the transfer of the judgment, in this case, from Vanhouten to Deloach, who had intermarried with one of the distributees, *ipso facto* amount to a satisfaction of the judgment? We affirm that it did not, but that it conferred a right upon Deloach to sue the execution to satisfaction against the property of the estate.

The judgment in favor of Vanhouten gave a lien upon all the personal property of Samuel Reily's estate, from the day of its rendition, in 1833. It cannot be questioned that that lien was in full force at the time Vanhouten transferred the judgment to Deloach.

The distribution of the intestate's property does not in anywise affect the lien. The judgment creditors can seize it in the hands of a distributee, and sell it to pay his judgment.

The law first appropriates a decedent's property to pay his debts, and the surplus to distributees. See *Brooks* v. *Lewis*, 1 How. 207.

According to the principle of this decision Vanhouten had, before the transfer, a clear right to have the *fi. fa.* levied upon any of the personal property of this estate, in the hands of any one of the distributees.

So far, then, as judgment creditors are concerned the distribution was void; and by it their rights are not in anywise compromised. At law, between the immediate parties, a judgment can only be satisfied by actual payment of the money, or by an agreement between the parties, to receive something, or do something which is an equivalent, and in lieu of payment. The terms of transfer from Vanhouten to Deloach, clearly indicate that the judgment was not by the contract of transfer to be satisfied. But that Deloach was substituted as owner and proprietor of the judgment, and to the use of the process of law to coerce the money.

Digitized by Google

It is true Deloach acquired by intermarriage a portion of the estate of Samuel Reily, deceased, and at the date of the transfer had that property in possession.

But does that, in law, work a satisfaction? If the property of one of these distributees is sold under this judgment, he can, in chancery, call upon his co-distributees for contribution, and thus have the burden equally apportioned. But because his property is alone levied upon, it is no reason for the interference of the common law court to order the judgment to be satisfied. And a distributee whose property had gone to pay this debt, would have this right to contribution, whether his property had been taken before Vanhouten assigned, as well as afterwards; by the assignment they are put in no worse condition than they were before.

The estate of Samuel Reily, deceased, is bound for the debt; his administrators are the defendants, and the only defendants. Now, authorities will be referred to by the counsel for defendant in error, to the effect, that if a note which has been in circulation, gets back into the hands of the maker, it is satisfied, and cannot be recirculated; and that if one defendant buys in the judgment he cannot run the execution for his benefit against a co-defendant; and that a sheriff cannot pay the plaintiff his debt, and keep open the judgment. But it is conceived that cases of this sort are not in point. This judgment is not against the distributees of Reily, in that character. In other words, Deloach is not a party defendant to the judgment; and there is no reason why a distributee may not take the assignment of a note, judgment, or mortgage, against the administrator, and enforce it. What circumstance disables him from being a creditor of the estate? and if creditor, surely he is put upon the same footing of judgment, mortgage, or general creditors, and can use for his benefit any liens which may attach to his debt. Deloach does not propose to make the full amount of this judgment out of the distributed property; he is willing to lose his proportion. The record, as I conceive, shows no ground of quashing the execution, and ordering it to be entered satisfied. If Presler, administrator, &c., loses by the sale of the

Digitized by Google

negro levied upon, more than the rate of one distributive share, he might go into equity for contribution, or he might have his remedy at law; but in either event he has no right of action over, until he has overpaid. A. has a judgment against B. & C. B.'s property is levied upon; it is no ground for quashing the execution because C.'s property is not also levied upon; nor has B. any claims upon C. until he has paid the debt. So in this case. If Deloach is not disabled from taking the assignment, he can levy upon any property liable to the satisfaction of the judgment; and the party whose property is levied upon cannot object that there is property in the hands of others equally liable. But after the paying the debt he has redress over. In 19 Johns. 395, a motion was made to satisfy or set aside the execution, upon a much stronger state of facts than those in this case; but the court refused, and sent the parties into chancery. 2 Dunlap's Pr. 865.

It is a sound rule that requires the most conclusive parol proof of payment, before a court will satisfy an execution; and it is submitted that such motion has not been in any case, except where the proof was clear of a payment in money.

George H. Gordon, for defendant in error.

The whole property owned by the decedent, Samuel Reily, in his lifetime, was ratably liable for the payment of this debt, and all of it had been distributed to his said heirs long before the rendition of said judgment in the high court of errors and appeals, as is fully admitted by the parties.

Now, if one distributee or party having a portion of it in possession, has paid the judgment, can such distributee or party proceed by process emanating from a court of law, to enforce a repayment or refunding the amount so paid by him? We think not. We apprehend that the mere assignment of the judgment by the plaintiff therein, to a distributee who shall have paid the debt which he was equally liable and bound to pay with the other distributees, cannot alter the case.

An assignment of the judgment to the person who may have paid it, and who was not a party to the record of such judg-

Digitized by Google

ment, would be the natural course to be pursued to invest such party with the interest in it, and we do not deny but that the distributee who has paid the judgment has a claim for contribution, ratably, upon the other distributees who have received their distributive shares of the property of the decedent. But we insist that said distributee who has thus paid the judgment cannot proceed to enforce the collection of it by running an execution thereon against the property distributed to any one of his co-distributees, as was attempted in this case, but that he can only proceed by a suit in equity for contribution, making his co-distributees, or their assigns, heirs or legal representatives, parties to such suit. This is done to prevent circuity, or vexatious litigation. The principle is fully illustrated in the case of *Avery* v. *Patten*, 7 Johns. Ch. R. 211, where Chancellor Kent refused to direct the assignment of a judgment upon the payment of it, to enable the assignee to levy upon the property of a party liable to be subjected to contribute towards the payment of such judgment. The learned chancellor in that case proceeds and says: "Such a direction would only be creating another chancery suit, in favor of some of the claimants, upon whom the plaintiff might elect to levy the whole, or an undue proportion of the judgment. There might be a succession of suits and assignments, upon the ground upon which this assignment is asked for, &c." Thus, then, we conceive it to be perfectly clear, that if a court of chancery would not direct the assignment of a judgment to a party who had paid it, but whose property was subject to be made liable to contribute towards the payment of such judgment, so as to enable him to levy an execution on the property of another person similarly situated in reference to said judgment, that a voluntary assignment made by the judgment creditor could not enable such assignee to run an execution on the judgment, and levy it upon the property of another similarly situated with himself. Indeed, we consider it to be a well-settled rule, that a party cannot sue or prosecute a proceeding at law, for any debt or demand, towards which he himself must ultimately contribute. Chitty on Bills, 70, 239; *Melborn* v. *Codd et al.* 7 Barn. & Cress.

Digitized by Google

R. 419; 14 Eng. Com. Law R. 67; *Teague* v. *Hubbard*, 15 Ibid. 234; *Bank of the United States* v. *Winston's Executors*, 2 Brock. R. 252. The counsel for the plaintiff in error has referred to the case of *Brooks* v. *Lewis*, 1 Howard's R. 207, to show that an execution issuing on a judgment rendered against the administrator of an intestate may be levied on the personal property of the decedent in the hands of the distributees. This we do not deny in a case where the original plaintiff on the judgment is seeking to enforce payment by virtue thereof. But how different is the case now before the court. In the case referred to in 1 Howard, a creditor of the decedent had obtained a judgment against the administrators of the intestate, and had his execution thereon levied on property of such intestate, which had been set apart and distributed to his distributees. In the present case the judgment creditor has been paid his judgment by one of the distributees who at the time of the payment owned and had in his possession the very fund and means which was legally subject to pay the debt. We again, therefore, repeat, that in thus satisfying the debt to the judgment creditor, such distributee did nothing more than he was as much bound to do as any other of the parties similarly situated with respect to said judgment as himself. So we conceive the case referred to in 1 Howard to be totally inapplicable to the case under consideration, and that the court below was clearly right in directing the execution at law to be discharged, under the peculiar circumstances of the case, as presented before it.

Mr. Justice CLAYTON delivered the opinion of the court.

The question in this case grows out of the quashing of an execution in the court below. The execution issued upon an affirmance of a judgment in the high court, and before that affirmance, but after the judgment in the court below, the whole property of the decedent had been distributed among the distributees of the estate.

The execution had been transferred by assignment to one of the distributees, who had received his proportion of the estate

Digitized by Google

in the process of distribution. Whether the transfer was made before or after the distribution took place, does not very certainly appear; but we infer it was afterwards. In this state of case this fact may not be very material.

The court below quashed the execution; and this order is attempted to be sustained here, first, on the ground that the purchase and assignment of the execution operated as a payment and discharge, and next, that as the beneficial interest was in one of the distributees, he could not have it levied upon property which had been divided out.

The question of payment, in matters of this kind, is always one of intention. If it is the intention and understanding of the parties, that the transaction shall be an assignment, there is nothing in the law to prevent its having that effect. It will pass the beneficial interest, and give to the party the right to use the name of the judgment creditor to enforce the execution.

On the other ground, it is enough to say, that there may be equities among the several distributees of the estate, as to the proportions in which they shall contribute to the payment of this claim; but this point cannot now arise. The whole estate was bound by the judgment lien for its payment. Upon the motion to quash, the court could not legally undertake to adjust the equities of the parties.

We see nothing to justify the order of the court below; it is therefore reversed, and the cause remanded.

Digitized by Google

ELIZA A. PENDLETON *vs.* JOSEPH W. PENDLETON.

The statute (H. & H. 395,) gives the widow of an intestate the preference of administering upon his estate; nor will that preference be taken away by the fact of her having once administered on the estate, and then renounced her administration; and of her claiming causes of action against the estate which were denied by the heirs.

ON appeal from the probate court of Lawrence county; Hon. Matthew B. Cannon, judge.

At the January term, 1845, of the court, Joseph W. Pendleton filed his petition, stating that Samuel Prestige, late administrator of Zebulon E. Pendleton, deceased, had departed this life, leaving the estate of his intestate without administration, and prayed that letters of administration *de bonis non* might be granted to John H. Oates and himself.

At the same term of the court, Eliza A. Pendleton, the widow of Zebulon E. Pendleton, filed her petition, praying letters of administration to be granted to her, she being entitled to them as his widow.

The court rendered the following decree, viz.

"It appearing, to the satisfaction of the court, that the said Eliza A. Pendleton has once been administratrix on said estate, and has renounced said administration; and it further appearing to the satisfaction of the court, that the said Eliza A. Pendleton has claimed causes of action against said estate, which are denied by the heirs; and it further appearing, that it is for the interest of said estate that administration thereof be forthwith granted; it is therefore ordered, adjudged and decreed by the court here, that the petition of the said Eliza A. Pendleton be disallowed, and that the petition of the said Joseph

Digitized by Google

W. Pendleton be granted, and that letters of administration *de bonis non* be given to him and John H. Oates, on said estate, upon their entering into bond, &c." From this order Mrs. Pendleton prayed an appeal.

There is filed in the record a statement, under oath, signed William A. Stone and O. F. M'Carty, that on the trial of the petitions no evidence whatever was introduced before the probate court, and that the probate judge refused to sign a statement to that effect.

The errors now assigned are, 1. That Mrs. Pendleton was entitled to the grant of letters; 2. That while a controversy was pending about the administration, the court appointed a party to that controversy administrator.

W. P. Harris, for appellant.

Both grounds are well taken. The principles which govern the appointment of administrators *de bonis non* are the same as obtain in the appointment of original administrators. H. & H. Digest, 395; 3 Bac. Abr. 19.

The widow had an undoubted right to the administration upon her deceased husband's estate, and the renunciation of the first administration by her, is not a waiver of the right to apply and obtain letters at a subsequent time, when the previous administration has expired. The same rule would apply as in case of executors. Stephens's Nisi Prius, 1832.

It is not at all uncommon for the widow to have claims against the estate of her deceased husband, nor is it unusual for the heirs to deny them; but certainly, the assertion of a claim, whether well or ill founded, whether denied or admitted by the heirs, would not disqualify the widow, or exclude her from the administration.

The statute H. & H. 385, requires the court of probate, when a controversy is pending in reference to the administration of an estate, to appoint some disinterested person. In this, therefore, the court below erred.

Van Winkle and *Potter*, on the same side.

Digitized by Google

Mr. Justice THACHER delivered the opinion of the court.

The appellant filed her petition in the probate court of Lawrence county, for a grant of letters of administration *de bonis non* of her deceased husband's estate. At the same term of that court, Joseph W. Pendleton filed his petition, praying for a grant of letters of administration *de bonis non* upon the same estate to himself and one John H. Oates. The probate court decreed that letters as aforesaid should be granted to said Joseph W. Pendleton and John H. Oates; and the decree further sets forth, that it had been made to appear to the satisfaction of the court, that said Eliza had been administratrix of said estate, and had renounced her said office, and thus she had claimed causes of action against the estate, which are denied by the heirs.

The record shows what appears to be designed as a bill of exceptions, signed by counsel under the act of 1840, chap. 12; but, if so designed, it is imperfect in substantial requisites, and does not effect the purpose. But admitting the statements contained in the decree to have been proved on the hearing, and to be facts, they do not constitute good reasons for refusing the grant of letters to the widow of the deceased. The statute prefers first the husband or wife of the deceased, and makes it imperative on the probate court so to decree upon due application, unless good cause be shown why such preference should not be allowed. H. & H. 395, § 36; Ibid. 397, § 40.

Judgment reversed, and cause remanded, with directions to disallow the petition of Joseph W. Pendleton, and to allow that of Eliza A. Pendleton.

Digitized by Google

PLEASANT C. MUIRHEAD *vs.* CATHERINE MUIRHEAD et al.

By the statute, the widow is entitled to take out letters of administration on her husband's estate, in preference to the son of the deceased.

M. died November 28, 1844; and at the December term, 1844, of the probate court, his son applied for, and obtained, letters of administration upon his estate; at the January term, 1845, and within sixty days from the death of her husband, the widow of M. applied for letters of administration, and for the removal of the son: *Held*, that the probate court was right in removing the son and conferring the appointment upon the widow.

The allowance or disallowance of continuances is in the discretion of the inferior court, and when that is exercised it will not be revised by the high court of errors and appeals.

As a general rule, when the probate court has conferred letters of administration, it cannot remove the incumbent, unless for some defined statutory cause.

Where the widow of the intestate had applied for letters of administration on her husband's estate; and his son by former marriage has made a like application, an affidavit by the son for a continuance of the application on the ground of the absence of a witness who could prove that a short time previous to the widow's marriage to the intestate, she was living with another man as husband and wife, will not constitute a legal showing for a continuance. The affidavit should also show that the individual charged to have been the first husband of the widow, was alive at the time of her intermarriage with the intestate.

Where the widow of an intestate told his son, in conversation, that she waived her right of administering on her husband's estate, and told him to take out letters, which he did; *held*, that these declarations not made in court, would not preclude the widow from changing her mind at any time within the period allotted by law, and asserting her right to the grant of administration to herself.

The widow of an intestate applying to administer on her deceased husband's estate, read the decree of a court divorcing the deceased from a former wife; this was excepted to by the party contesting her right to the administration: *Held*, that if the admission of the decree were erroneous, it could not operate to the benefit or injury of either party, as her husband's right to marry was not questioned; and it could not therefore defeat the widow's right.

Digitized by Google

On appeal, from the Choctaw circuit court; Hon. James A. Kennedy, judge.

At the December term, 1844, of the probate court of this county, Pleasant C. Muirhead, by petition, prayed for the grant of letters of administration on the estate of Charles Muirhead, his father, who, the petition stated, had departed this life on the 28th November, A. D. 1844, intestate. At the same term of the court, the prayer of the petition was granted; and the petitioner executed bond and qualified according to law.

At the January term, 1845, of the court, Catherine Muirhead, the widow of the intestate, applied to the court for letters to be granted to herself and to her next friend, James A. Peeples. At the same term, Pleasant C. Muirhead, appeared and contested of record her right to the letters on the ground of the previous grant to him. The probate court ordered a citation to issue to P. C. Muirhead to appear and answer the petition at the February term. At that term he appeared and moved for a continuance of the cause upon affidavit of the absence of a witness by whom he expected to prove, "that a short time before the marriage of the said Catherine Muirhead with the deceased, Riley Chappell was her husband, or that they cohabited together as man and wife and represented themselves to the world as such;" and that this witness had been duly summoned, &c. The court overruled the motion, revoked the letters granted in December, and granted letters to the widow and Peeples, who forthwith gave bond and qualified.

P. C. Muirhead moved for a new trial, which being refused he filed a bill of exceptions; from which it appears that on the hearing of her petition the widow read a decree of the circuit court of Holmes county dissolving the bands of matrimony between Charles Muirhead and a former wife; to the introduction of which, P. C. Muirhead excepted. P. C. Muirhead then offered to prove that a few days before the December term, 1844, the widow had waived her right of administration on the estate of her husband, and requested P. C. Muirhead to go forward and obtain letters of administration. The probate

Digitized by Google

court refused to hear the testimony. Exceptions were signed and an appeal prayed and prosecuted by P. C. Muirhead.

A. C. Baine, for appellant.

1. This is a contest about who shall be administrator of an estate. The *first* probate court, after the death of the intestate, his son was appointed. At the succeeding term his alleged wife applied to have his letters revoked. The statute, I think, in the first place precluded her from doing so, successfully and rightly. See Rev. Code, 42, sec. 54. By this section it appears to me if she do not appear at the first court, after the decease of her husband, that then it may appoint any other person. In *Ex parte Dililah Moore*, 7 How. 665, the court settled the principle of this branch of the case, though not the point here contested.

2. The next point is, that though the appointment had been injudicious, the court could not remove the person appointed, unless for some defined statutory cause. *Lehr* v. *Tarball*, 2 How. 905.

3. Conceding the right to be, as the defendant contends it is, yet it is a right that may not only tacitly be waived, as appears by the statute cited in the first point, but as all other rights, it may be expressly waived. The plaintiff offered not only to prove an express waiver, but an authority to himself to take out letters. The court refused to hear and act upon the proof. For this, if there were no other reason, the court will reverse the judgment.

4. There was an offer to prove that defendant was not the legal wife of the intestate, and a continuance was asked to procure the witness. This was denied; and being a matter within the discretion of the court (the continuance) was probably not error. But the defendant admitted the fact as charged by the plaintiff and tried to rebut it; but we think wholly failed. To prove her divorce from the former husband she offered the decree granting it, without any of the proceedings on which it was founded. In other words she offered a part — a detached portion — of the record to prove the fact in issue. I need not,

Digitized by Google

I presume, refer to authorities to show that this was error. The court, since the first of this month, (February, 1846,) has decided this to be erroneous.

Any one of the four points we have taken in this case, is conceived to be sufficient to reverse it.

Mr. Justice THACHER delivered the opinion of the court.

At the December term, 1844, of the probate court of Choctaw county, the appellant filed his petition praying for letters of administration upon the estate of Charles Muirhead, deceased, intestate. This petition alleges that the deceased died on the 28th day of November, 1844, and that petitioner is his son and heir. At the January term, 1845, Catherine Muirhead, appellee, filed her petition praying for letters of administration upon the same estate for herself and James A. Peeples, her next friend. This petition alleges that the deceased died on or about the 19th day of December, 1844, and that petitioner was his widow. The appellant contested the right of the appellee to the prayer of her petition. At the February term following of the probate court, the appellant moved for a continuance of the hearing of the cause on account of the absence of a witness by whom he expected to prove that a short time previous to the marriage of the appellee and the deceased she and an individual were living as husband and wife. This motion was overruled. Upon the hearing, the appellee introduced a decree of a circuit court of the divorce of the deceased from a former wife. The appellant proved that the appellee had, some few days before the December term of the probate court, in conversation with the appellant, waived her right to letters of administration upon the estate, and desired him to obtain the same in his own behalf. The court below revoked the letters of administration of the appellant and decreed letters to the appellee upon the estate.

The statutes of this state, H. & H. 395, sec. 35, prefer first the husband or wife in the grant of letters of administration. By this statute, the privilege of the husband or wife surviving may be lost by their failure to apply for such letters within

Digitized by Google

sixty days from the death of the intestate, or at the next succeeding court after the expiration of sixty days from the death of the intestate. There seems to be some doubt, in the case at bar, concerning the precise date of the decease of Charles Muirhead; but if we presume it to have occurred at the earliest day charged in the record, to wit, on the 28th day of November, 1844, the application of his widow at the January term of the probate court following that date, was within the time prescribed by law. The objection, therefore, raised to the lateness of the widow's application for letters of administration, is not effectual.

It is also insisted that the probate court, having made an appointment of administrator, cannot remove the incumbent unless for some defined statutory cause. This position, as a general rule, is correct, but it is unavailable where the appointment of that incumbent is shown to have been premature.

The objection, grounded upon the fact that the probate court refused the application for a continuance of the hearing, cannot operate beneficially for the appellant here. It has been repeatedly decided that the judgment upon an application for a continuance, being a matter of judicial discretion, is not a good cause of error. In this instance, moreover, the affidavit for a continuance was in point of law insufficient, in not setting out that the individual, charged to have been the husband of the appellee, was alive at the date of her marriage with the intestate, and also in some other respects, and the motion was therefore properly overruled. The attempt of the appellee, upon the hearing, to prove the divorce of the intestate from a former wife, was altogether gratuitous and unnecessary, and may be treated as surplusage. The legitimacy of her marriage with the intestate was not contested, or pretended to be, on the score of his incapacity to contract a marriage with her.

Finally, the position that the appellee waived her statutory privilege to a grant of letters in the first instance, is equally unsubstantial. This waiver does not appear to have been

Digitized by Google

done in court, but merely to have been privately made to the appellant, with a request to him to assume and apply for the office. In this particular, she had a right, and, it seems, did change her mind within the time allowed her by law.

Judgment affirmed.

Digitized by Google

The Commercial Bank of Manchester *vs.* Angus C. Chisholm et al.

The Commercial Bank of Manchester lent to C. & M. $12,000, for which they were to ship cotton to the merchants of the bank to be shipped to Liverpool, and sold for account of C. & M., and the proceeds to be credited on the note of C. & M. for the sum lent; C. & M. shipped two hundred bales of cotton, which was sent to Liverpool, and for which the bank credited C. & M.'s note with $6711 39, as the proceeds of sale. C. & M. not being satisfied with the credit thus given, it was *held* that they had a right to show, by way of increasing the amount of offset, the quality of the crop of cotton of that year, the usual weight of the bales, and the average price at Liverpool about the time the sale took place.

In such case the account of sales rendered by the English house (to which the cotton was shipped) to the bank, would not be evidence in itself; the deposition of some one acquainted with the transaction would be requisite to establish its truth, and thus make it admissible.

Nor in such a case would the defendant be authorized to show that the notes of the bank, at and near the time of the maturity of the note, were at a discount in New Orleans, by way of increasing the amount of offset. If any such inquiry be instituted into the value of the money loaned, it must be confined to the time of the loan, and the place where it occurred.

If the notes were at par value when received by C. & M., and the bank be by the contract liable for the difference of exchange, the measure of her liability would be the premium between par and exchange on Liverpool at the time of the sale of the cotton.

If the notes were below par when paid out by the bank, then the amount of discount on them must be added to that premium, so as to make them equivalent to par funds at the time they were paid out.

In error from the Tallahatchee circuit court; Hon. Benjamin F. Caruthers, judge.

The Commercial Bank of Manchester, the plaintiff in error, brought an action in the circuit court of Yallabusha county, at the November term, 1840, against Angus C. Chisholm, James Minter, Caleb P. Alexander and George W. Saunders, the de-

Digitized by Google

fendants in error, on their promissory note for the sum of $12,000, dated in January, 1839, and payable on the 18th of December, 1839; the plea of payment, with bills of particulars, was filed in these words, viz.:

Commercial Bank of Manchester, *Dr.*
To Chisholm & Minter:

To 200 bales cotton, delivered April 1839, weighing 84,300 lbs. at 15 cts.		$12,645 00
Freight and charges, $2,	$400	
Storage, labor and weighing, $0 50,	100	
Insurance, 50 c.	100	
Commissions, 2½ per cent.	316 12	916 88
		11,728 88
Difference of exchange between Manchester post notes and New Orleans funds, at 20 per ct.		2,345 77
		14,074 65
Interest on above amount for eight months to maturity of note,		750 61
		14,825 26
Amount of note subtracted,		12,000 00
		2,825 26
Interest from 18th Dec. 1839, to May, 1842,		536 74
Balance due Chisholm & Minter,		$3,362 00

The defendants also filed another bill of particulars of the same items, differing in the amounts of the value of the cotton and charges, which left the balance claimed by Chisholm & Minter, $7158 65.

At the May term, 1843, a verdict was given for the defendants, and the jury certified a balance in their favor for the sum of $2827 17½, and the court rendered a judgment accordingly.

By the bill of exceptions filed in the record, it appears that on

Digitized by Google

the trial, the plaintiff offered in evidence to the jury the promissory note sued on, with this indorsement on it: "Received on this note $6711 39, it being proceeds of 200 bales of cotton sold in Liverpool, on account thereof. January 3d, 1840." The defendants read in evidence the deposition of S. H. Buckner, a member of the firm of Buckner, Stanton & Co., who proved that that firm acted as receiving and shipping agents of the plaintiff in the winter of 1838 and spring of 1839. In April, 1839, said firm received two hundred bales of cotton, shipped to them for account of defendants, with instructions from them to reship to Liverpool for account of the plaintiffs. By instructions from the plaintiffs, the cotton was reshipped to Magniac, Smith & Co., Liverpool, for sale for account of defendants; proceeds to be held subject to order, and for account of plaintiffs. The deposition of Francis Ganahal was read by the defendants. Deponent has pursued the commission business in the cotton trade in New Orleans ever since the year 1833. In the Liverpool market, on 3d January, 1840, cotton, Liverpool fair, was worth 7 pence. In July, 1839, cotton of that quality was worth from 7¾ to 8 pence; and in August, 1839, was worth 7¾ pence. The sterling exchange on Louisiana for New Orleans funds was in August, 1839, at 11 to 11½ premium; and in January, 1840, it was at 9½ to 10 premium. That of his own knowledge he did not know the value of the notes and post notes of the plaintiff; but they were quoted by brokers, the notes on demand at three per cent. discount, and the post notes 22 per cent. discount, in January, 1840; and in August, 1839, the former at 7 per cent. and the latter at 20 per cent. discount. This deposition was objected to, but the objection overruled.

Thomas J. N. Bridges, who was introduced as a witness by defendants, testified that the average weight of bales of cotton was about 450 pounds; that the crop of 1839 was generally good.

William Minter, a witness on behalf of defendants, testified that in 1839 he lived three miles from Troy; that the crop of that year was the best ever raised; that the neighbors generally shipped through Minter and Chisholm, at Troy. Metcalf tes-

Digitized by Google

tified, that the average weight of bales of cotton was 450 pounds. McLaughlin testified, that the crop of 1839 was very good. Witness, Martin, stated that there were more good samples in a lot of cotton of the year 1839 than usual; that all crops grade down in their classification two or three qualities from the best sample; that the fine samples of that year were very fine. Granville R. Morris testified, that the 200 bales shipped by defendants, Minter & Chisholm, to Buckner, Stanton & Co., New Orleans, averaged in weight 416⅛ pounds each, and that they would have classed good fair. He stated, on cross-examination, that it was his impression the defendants, Minter & Chisholm had returns for said 200 bales from Liverpool; he thought he had seen them. On re-examination, he stated that he could not say the returns he saw them have were from Liverpool; they came to them through Mr. Hughes, cashier of the Commercial Bank of Manchester (the plaintiff.) The defendants then read to the jury a letter addressed to Chisholm & Minter, from the Commercial Bank at Manchester, on the 11th of March, 1839, signed by J. J. Hughes, cashier, whose signature was admitted by plaintiff's counsel, stating that he had received a bill of lading for 35 bales of cotton, consigned to Buckner, Stanton & Co., New Orleans, the proceeds of which were directed to be held subject to the order of the bank for defendants' account. Also another letter dated on the 23d of March, 1839, in which he states that he had received bills of lading for 211 bales of cotton, shipped by defendants to Buckner, Stanton & Co., New Orleans, to be sold by the bank for defendants' account.

The plaintiff objected to all of the foregoing testimony, except the deposition of Buckner.

The bank, by way of rebutting proof, offered to read to the jury the account of sales of the cotton at Liverpool, forwarded by the merchants at that place, to whom the cotton had been sent for sale, and by whom it had been sold. The defendants objected to their being read, and the court sustained the objection, and plaintiffs excepted.

After the jury had rendered their verdict, the plaintiffs moved for a new trial, which being refused, they prosecuted this writ of error.

Digitized by Google

A. C. Baine, for plaintiff in error.

1. The first error apparent on this record is the admission of the letters of Hughes. One of these letters was introduced to prove that 211 bales had been received by the bank, when in no one of the three bills of particulars is a charge made for but 200; a party cannot be allowed to go beyond his bill of particulars with his proof. See statute.

2. All the testimony of Ganahal, and all others subsequent to Buckner's was erroneously admitted; because Buckner's deposition proves that the cotton was to be, and was in fact shipped by the plaintiff for and on account of the defendants. This being so, no testimony was proper but such as proved the bank had acted in bad faith in the sale of the cotton; or proof that the bank in Liverpool actually received more than it credited the note for.

3. The court erroneously ruled out the account of sales the plaintiff proposed to introduce, for the reason that the defendants had the means in their own hands to prove them false if not correct; because Morris, their own witness, proves they (defendants) had the account of sales rendered to them.

William G. Thompson, for defendants in error.

It is contended by the counsel for the plaintiff in error in the first place, that the letters of Hughes were improperly admitted in evidence before the jury. These letters were written by the cashier of the bank (the plaintiff below,) admitting that bills of lading had been received for as many bales of cotton as the defendants below claimed a credit for. And the admission that eleven, or any number of other bales were received, surely does not render those letters irrelevant to the matter in controversy. Other advances may have been made by the bank, and there is allusion to that in one of the letters, for which an appropriation was to be made of the additional bales.

It is contended, secondly, that no testimony subsequently to Buckner's deposition could have been properly admitted, except such as proved the bank acted in bad faith in the sale of the cotton. There was no contract that the note should be credited

Digitized by Google

with a definite sum, by the proceeds of the 200 bales of cotton. Buckner proves that the bank assumed the control of the cotton in his hands; this was certainly allowed by the defendants, with the understanding that due efforts should be made to obtain the best price for it. The bank offered no testimony of any description to show what the cotton sold for; the defendants have clearly proven, that it might have been sold for a greatly larger sum than the note is credited with.

It is contended, thirdly, that the court below erred in ruling out the account of sales offered by the plaintiff. It was in proof that the cotton in controversy had been shipped to a house in Liverpool. The account of sales offered by the plaintiff was from a house in London; and it does not appear that it had any relation to the cotton shipped by the defendants. So it was properly ruled out. The witness Morris did not state that the defendants had an account of the sales of this cotton. It was merely his impression that he had seen it. These are all the objections raised by the plaintiffs to the judgment in this case.

Mr. Justice CLAYTON delivered the opinion of the court.

In January, 1839, the plaintiff in error lent to Chisholm & Minter $12,000, payable eleven months thereafter, which seems to have been an advance to them, for which they were to ship cotton to the commission merchants of the bank at New Orleans, to be thence reshipped to Liverpool, and sold for account of Chisholm & Minter, and the proceeds to be held subject to the order of the bank. In April, 1839, two hundred bales of cotton were received by Buckner, Stanton & Co., at New Orleans, shipped to Maginac, Smith & Co., at Liverpool, and for which the bank afterwards rendered a credit of $6711 39. Chisholm & Minter were not satisfied with the amount of this credit, and they introduced testimony to show, that cotton bore a higher price in Liverpool about the time when the sale was made, than was allowed them. The jury found a verdict for the defendants, and gave a certificate for nearly $3000 in their favor. After refusal to grant a new trial, the case was brought to this court.

Digitized by Google

Much of the testimony introduced by the defendants was objected to by the plaintiff, but was permitted to go to the jury. That which relates to the quality of the crop of cotton shipped in 1839, the usual weight of bales, and the average price at Liverpool about the time the sale took place, is in our view free from objection.

As rebutting proof the plaintiff offered in evidence, the account of sales rendered by the English house to which the cotton was shipped. This was rejected by the court, and a bill of exceptions taken to its exclusion. There is no principle which would make the account of sales in itself evidence; the deposition of some one acquainted with the transaction would be requisite to make it admissible.

The testimony introduced by the defendants, in regard to the value of the notes of the Manchester Bank at New Orleans, in August and October, 1839, and January, 1840, was wrongly admitted. There was no proof as to the kind of money loaned to them, though it is fair to presume it was the notes of the bank; neither is there any proof as to their being post notes, or payable on demand. The evidence too relates to a period long after the transaction with the defendants, and to a place distant from the bank. If inquiry is to be instituted into the value of the money loaned, it must be confined to the time of the loan, and the place where it occurred. If the notes were of par value when received, all that the plaintiff can be chargeable with for foreign exchange is the premium between par paper and exchange on Liverpool at the time of the sale of the cotton. If below par when paid out by the bank, then the amount of discount upon them must be added to that premium, so as to make them equivalent to par funds at the time they were paid out by the bank.

Judgment reversed, and new trial awarded.

Digitized by Google

Jilson P. Harrison *vs.* Ransom D. Crowder.

By making a note payable at a particular bank, the parties are presumed to consent to be governed by such customs as may prevail in the bank with regard to making demands of payment.

A greater strictness must be observed in making demand of payment at a bank having banking hours, than is necessary in personal demands. A personal demand may be made at any time during the third day of grace, but a constructive demand at a bank with business hours, must be made at the close of the business hours; for the maker has until that time to deposit the money for the payment of the note.

In an action against the indorser of a promissory note payable at a bank with banking hours, the notary testified that he had no recollection of the fact or time of presentment, except from his protest, from which he had no doubt that he did present the note; that when he protested the note sued on, his habit was to make demand of payment *about* the close of banking hours, believing that practice to conform to the law; when payment was refused, he took the note away with him; he could not say whether the note sued on had been presented an hour or a minute before the close of the bank, except from his habit of presentation, about that time. *Held*, that the testimony should have been left to the jury, for them to say whether the demand on the note had been made about the close of banking hours.

There is no rule of law which compels a holder of a note to deposit it in the bank at which it is made payable; if it be presented there at the close of business hours, it must be sufficient.

The law does not prescribe impracticable rules; it seems therefore that when a note is payable at a bank having business hours, it is not absolutely essential that the note shall be presented at the very moment of closing the doors of the bank; probably a few minutes would be regarded as of little consequence in the application of the rule.

Where, in an action against the indorser of a note, payable at a bank with business hours, the judge instructed the jury, that a demand of payment "*in some reasonable or convenient time before the doors were closed*," would be sufficient, it was *held* that the instruction was erroneous.

In error, from the Warren circuit court; Hon. George Coalter, judge.

Digitized by Google

Ranson D. Crowder sued William S. Bodley as the maker, and Jilson P. Harrison as the indorser of a promissory note, in these words, viz.:

"*Vicksburg*, *January* 5, 1839.

"Twelve months after the 5th day of January, 1839, I promise to pay J. P. Harrison, or order, the sum of four thousand dollars without defalcation, for value received, negotiable and payable at the Commercial and Railroad Bank of Vicksburg.

"WILLIAM S. BODLEY."

(Indorsed, "J. P. Harrison.")

The defendants plead *non assumpsit*. On the trial, John F. Pierson testified that he was, on the 8th of January, 1840, a justice of the peace and notary public, residing in Vicksburg; that on that day the promissory note sued on was delivered to him by Robert S. Riddle, then cashier of the branch of the Planters Bank in Vicksburg, for the purpose of being presented at the Commercial and Railroad Bank of Vicksburg for collection; that he accordingly went to the Commercial and Railroad Bank on that day with the note in his possession, and then and there, during the banking hours of the bank, presented the note to the teller of the bank for payment, and demanded payment of it, which was refused, whereupon he left the bank, and he presumes took the note away with him. He had no recollection of the fact of presentation or of the precise time of day when it was made: but from his protest before him, stating those facts, he had no doubt of the demand and refusal on that day having occurred. That when he commenced acting as notary public, he adopted the rule of presenting notes for payment during the last hour of bank hours on the last day of grace, and about the close of the bank hours or business hours of the bank, believing, from an examination he had made, that such a presentation was necessary in order to fix the liability of indorsers. He had, however, no recollection of the time when presentation was made in this case; that his practice was to take the note away with him when payment was refused; he did not recollect that he ever remained in bank, but on one occasion, until the bank closed its doors, and then he left through the back

Digitized by Google

door. He did not recollect or believe that he pursued that course in the present case; he would not say that he presented the note sued on one hour, or one minute, or any specific time before the expiration of banking hours, except from his usual habit at that time of making demand of payment about the time the bank closed and the last of the banking hours; he had no recollection on the subject. He delivered the notice of protest to the defendant Harrison at his residence in Vicksburg, on the morning after the note was presented for payment.

This being all the evidence on the part of the plaintiff, I. G. Bibby, on the part of the defendant, proved that he was the teller in the Commercial and Railroad Bank at the maturity of the note, and previous; that the banking hours of the bank were from ten o'clock in the morning until two o'clock in the afternoon, at which last hour the bank closed for the day; that upon all paper payable at and held by the bank, the debtor had until the expiration of banking hours on the last day of grace to make payment; such was the settled usage of the bank at the time the note sued on was made, and at the time it was payable; and by the same usage, no note or bill was regarded as dishonored if payment thereof were made on the last day of grace at any moment before the expiration of banking hours. There was no usage or custom in reference to paper payable at the bank, but not owned by it or held by it for collection.

This being all the evidence, the defendant's counsel asked the court to instruct the jury as follows: 1. That if the jury believe, from the evidence, it was the usage and custom of the Commercial and Railroad Bank of Vicksburg to regard notes due to it and payable at it, as only due at the expiration of the business hours of the bank on the third day of grace, then all notes made payable at the bank are governed by this usage; and that the note sued on in this case was not, if such usage were proved, due until the expiration of the business hours of the bank on the 8th day of January, 1840; and a presentation and demand of payment before that time is insufficient to charge the indorser, Harrison. 2. That it is incumbent on the plaintiff to prove to the satisfaction of the jury, that the note

Digitized by Google

was left in bank, and was in the bank for presentation when the bank closed its business hours on the 8th of January, 1840; if such proof be not made, they must find for Harrison. 3. That in order to charge the indorser, the testimony must not leave it doubtful whether the note was in bank at the time it closed its business hours on the 8th of January, 1840, but it must appear from the testimony, clearly and satisfactorily, that it was left there.

The court refused to give the instructions as prayed for; but gave them with this qualification: "That if the jury believed from the evidence the note was in said bank at the close of its business hours on the 8th day of January, 1840; or if they believed it was presented and payment demanded at the close of its business hours by the notary; or demand made by him in some reasonable and convenient time before its doors were closed on that day, it will be sufficient to charge the indorser, and they must find for the plaintiff.

The jury found for the plaintiff; the defendant, Harrison, moved for a new trial; which being refused, he embodied the evidence in a bill of exceptions, and has brought the case to this court by writ of error.

J. O. Harrison, for plaintiff in error.

The rule which the witness says he adopted, of presenting notes for payment during the last hour of bank hours, was not the correct rule, because the note, in the language of the high court of errors, in the case of *The Planters Bank* v. *Markham*, 5 How. 397, cannot be considered as "due until the expiration of the hour allowed for payment by the usage of the bank."

It is necessary that there should be some well-established and fixed rule for presenting commercial paper for payment. The law has established the rule, and has fixed the time of presentation. The holder must wait until the maturity of the note; he cannot demand payment and protest for non-payment before the expiration of the last moment up to which the maker has by law the right to tender his money and demand the note.

If it be a sufficient demand to present the note for payment

Digitized by Google

during the last banking hour, then it must be equally sufficient to demand payment immediately after the opening of bank in the morning, or at any other time during the business hours of the bank. But this court has, upon full argument, determined such demand to be insufficient. Nor, for the same reason, is it sufficient to demand payment about the close of bank hours. Such testimony is entirely too vague and indefinite for any legal purpose. What precise time is meant by the expression, about the close of bank hours? It cannot of course mean at the close. It must necessarily mean a point of time either before or after the bank closed.

The law requires that commercial paper shall be presented for payment on the third day of grace. Suppose the notary should testify that he did not recollect the precise day on which he made demand of payment, but that his practice was to make the demand about the last day of grace, and therefore he believes that he did in the present case present the note for payment somewhere about the last day of grace; would the court, upon such a state of fact, decide that the law had been complied with? Surely not.

The rule, as settled by this court in the case of *The Planters Bank* v. *Markham*, subjects no one to inconvenience; because, if the notary does not wish to remain in bank until it closes, he can deposit the note there, which of itself would be a sufficient demand of payment.

From this examination of the testimony I think it manifest that there is, in fact, no difference between this and the case against Markham, and of course the law should be the same.

The court will perceive that the instructions asked for on the part of the defendant, Harrison, were based upon the decision of this court in the case against Markham, and were drawn almost verbatim from that decision. The court below, however, was of opinion that the rule, as there established, was much too rigid, and attempted to introduce a modification of it by instructing the jury "that the demand was sufficient if made by the notary in some reasonable and convenient time before the bank closed its doors on that day."

Digitized by Google

Now what is meant by reasonable and convenient time? Whose convenience is to be consulted? That of the notary, or that of the bank? Are parties to go back one, or two, or three, or even more years, for the purpose of ascertaining and proving the various circumstances under which the demand was made, in order to show that the demand was or was not made at a reasonable and convenient time? Will this court depart from a fixed and definite rule of law, and put this question upon the uncertain basis upon which the court below has attempted to place it? It is to be hoped not.

It will be seen that the proof as to the usage of the bank is the same in this case with that in the case of Markham. The only question is, whether this court will adhere to its own decision, pronounced as it was upon full argument, and which establishes a rule at once precise, intelligible, and definite, or adopt the modification of the court below, which leaves the time of the maturity of a note to be fixed, not by the rigid rules of law, and the contract of the parties, but by the convenience of the notary public who presents it for payment.

Mason and *Burwell*, for defendant in error.

The only question presented by the bill of exceptions for this court to decide, is whether the notary, who protested the note, made a proper and legal demand of payment at the Commercial and Railroad Bank, the place of payment mentioned in the note, and whether the instruction of the court below was correct on that subject. The bill of exceptions presents a case very different from that of *The Planters Bank* v. *Markham*, in 5 Howard's Reports, and relied on by the counsel for the plaintiff in error. In that case the notary stated, "that he did not recollect how long before the expiration of the business hours of the bank he left, and, as he believes, carried the note with him which was protested." So that in the case of *The Planters Bank* v. *Markham*, it is found from the testimony of the notary that he demanded payment and left the bank, taking the note with him, before the termination of the business hours of the bank, which was considered by this court not to consti-

Digitized by Google

tute a good demand; but in this case no such facts occur. On the contrary, the notary stated that on the 8th day of January, 1840, with the said promissory note in his possession, he went to the said Commercial and Railroad Bank, and did, then and there, during the banking hours of said bank, present the said note to the teller of said bank for payment, and did then and there demand payment thereof, and that payment thereof was refused, whereupon he the said notary left the said bank, and, as he presumes, took the said note away with him." It was proved by the cashier of the bank, that the Commercial and Railroad Bank had regular business hours, to wit, from ten until two o'clock. So far, then, from presenting a state of facts similar to those of the case reported in 5 Howard, the testimony of the notary, so far, brings this case within the decision made by this court, in the case of *Fleming et al.* v. *Fulton*, 6 Howard. In that case the notary certified, that on the 16th March, 1839, he went to the Planters Bank at Natchez, and then and there presented the original note for payment, demanded payment, and was answered by the teller of said bank, that the note would not be paid. And the court charged the jury, that the presentment, demand and notice, as proved, as aforesaid, were sufficient to charge the indorsers. The Planters Bank was also proved to have regular business hours. Judgment was rendered against them, which was affirmed by this court; and in its opinion, it says: "The notary does not state the hour of the day, and it must be presumed, until the contrary appears, that the presentment was at the proper hour." *Fleming et al.* v. *Fulton*, 6 How. 484.

In this case the contrary does not appear. Examine the testimony, and it goes, so far from weakening the presumption that the presentment was made at the proper hour, or (in the language of the court, in 6 Howard,) "in making the contrary appear," expressly to state that he knew that the presentation and demand should be made at the last hour, and about the close of banking hours; and that his habit was to make demand of payment about the time the bank closed, and the last of the banking hours. Here, then, we have a case in the

Digitized by Google

testimony of this notary, which strengthens "the presumption that the presentment was at the proper time." He does not, and cannot name the hour, except that it was during banking hours, and on the last day of grace; this would be enough, the court have said, "as it will be presumed that it was at the proper hour, until the contrary appears." But he then states facts which make this presumption amount to conviction, that he did present the note at the proper hour, to wit, that he had examined the subject when he commenced acting as notary public, and knew that the presentment should be made at the close of business hours of the bank, on the last day of grace, and that his usual habit was, at that time, to make demand of payment about the time the bank closed, and the last of the banking hours.

The counsel for the plaintiff in error have not kept in view the fact that the notary, in the case of *The Planters Bank* v. *Markham*, expressly stated that he made the presentment and demand, and took the note away from the bank *before* the close of the banking hours; and that in this case the facts were wholly different. The instructions given by the court were in accordance with the rule laid down by this court, in the case reported in 6 Howard, 484.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This suit was brought against the maker and the indorser of a promissory note. To establish the liability of the indorser, the notary was called, who testified that he presented the note at the bank where it was made payable, on the last day of grace, during banking hours. On being questioned as to the particular time of presentment, he stated that he had no recollection of the fact of presentment, or the precise time at which it occurred, except by reference to his protest, then before him, but had no doubt that he did so present the note. He further stated, that when he commenced acting as notary, he adopted the rule of presenting notes on the last hour of banking hours, on the last day of grace, and about the close of the business hours, believing that practice to conform to the law. He had

Digitized by Google

no recollection, however, of the time when presentation was made in this case. His practice was to take the note away with him when payment was refused. He did not recollect that he ever remained in bank until it closed, except on one occasion, and did not recollect or believe that he pursued that course with this note. He would not say that he presented this note one hour, or one minute, or any specific time before the close of banking hours, except from his usual habit of making demand about the time the bank closed. Notice was delivered to the indorser at his residence. The teller in the bank stated that the bank had regular business hours, from ten o'clock, A. M. until two, P. M., and, by the custom of the bank, debtors had until the expiration of banking hours to pay, and that no note was considered dishonored, if payment was made at the last moment.

On this evidence the defendant's counsel requested the court to charge the jury, that if they believed it was the usage and custom of the bank to regard notes payable there, as only due at the expiration of business hours on the third day of grace, then notes made payable at the bank are governed by this usage, and the note sued on was not due until the expiration of business hours on the third day of grace, and that a presentation and demand of payment before that time, is insufficient to charge the indorser.

That it is incumbent on the plaintiff to prove to the satisfaction of the jury, that the note was left in bank, and was there when the bank closed on the third day of grace; and if such proof is not made they must find for the defendant.

That in order to charge an indorser, the testimony must not leave it doubtful whether the note was in bank when it closed, but it must appear clearly and satisfactorily that it was there.

The court refused the instructions, except with this modification; that if the note was in bank at the close of business hours; or if it was presented by the notary, and payment demanded, at the close of business hours; or if a demand was made by him at some reasonable or convenient time before the doors were closed on the third day of grace, it will be sufficient, to charge the indorser.

Digitized by Google

The law undoubtedly is, that by making a note payable at a particular bank, the parties are presumed to consent to be governed by such customs as may prevail in the bank, with regard to making demand of payment. A greater strictness must be observed in making these constructive demands, than is necessary in personal demands. A personal demand may be made at any time during the third day of grace, but a constructive demand at bank, having regular business hours, must be made at the close of the business hours, for the maker has until that time to deposit the money for the payment of the note. This rule has in it more strictness than reason; but as it is so established, it is best not to depart from it.

It is very difficult to distinguish this case from that of *The Planters Bank* v. *Markham*, 5 How. 397, and yet there is some difference. In both cases the notaries state that they do not recollect the precise time of presentment; but in this case the notary states that it was his usual habit to present notes for payment about the close of business hours, which rule he had adopted from a conviction that in that way only would an indorser be bound. Had this testimony been left to the jury without a charge, it is quite probable they would have found for the plaintiff. The question was so nicely balanced as to make it proper that it should have been left to the jury to say whether the demand in this instance was made about the close of business hours. In the case of *The Planters Bank* v. *Markham*, it was said, "that a note or other security thus payable at a bank, cannot be considered as due until the expiration of the hour allowed for payment by the invariable usage of the bank; and that it must be left at the bank until the completion of the allotted hour." In the application of this rule to notes held by the bank, there can be no difficulty. But it may be exacting too much to require a literal compliance when notes are held by individuals. There is no rule of law which compels a holder to deposit his note in the bank at which it was made payable. If it be presented there at the close of business hours, it must be sufficient; and this I apprehend was all that was meant in the decision of *The Planters Bank* v. *Markham*.

Digitized by Google

Here a difficulty again occurs; must the demand be made at the very moment of closing the doors of the bank, that point of time being the termination of business hours? Or will some anterior time answer the purpose? The law does not prescribe impracticable rules. Its requirements are reasonable, and probably a few minutes would be regarded as of little consequence in the application of the rule. But the court seems to have laid down the rule of law with greater latitude than is fairly warrantable, when it was said a demand made "in some reasonable or convenient time before the doors were closed," would be sufficient. We would avoid verbal criticisms as much as possible, and yet it sometimes becomes necessary to weigh the signification of words. A reasonable time would present a question of law; but a "convenient time" before the closing the doors is too indefinite. It must mean the convenience of the notary; and it might best suit his convenience to make the demand in the morning when the doors were opened. The charge sustained, would establish a new rule, and lead to refinements of a perplexing character, which should be avoided. We therefore conclude there was error in the charge, for which the judgment should be reversed, and the cause remanded.

Digitized by Google

ROBERT ANDERSON *vs.* PATRICK BURKE.

A special plea of set-off in an action of *assumpsit* may properly be treated as a nullity. Yet if it be demurred to, the demurrer must be disposed of, or it will be error.

When a plea of set-off to an action of *assumpsit* is filed and demurred to, however technically correct it may be pleaded, the plea being such as from its intrinsic nature, a judgment according to law cannot be given sustaining it, the demurrer must be sustained.

A. being sued by B. in *assumpsit* for wages due B. as overseer for A.; plead a special plea of set-off, in effect that B. was indebted to A. in the sum of one thousand dollars, and had promised to pay it in consideration of the death of A.'s slave, caused by B. To this plea B. demurred: *Held*, that the demurrer was properly sustained.

IN error, from the Franklin circuit court; Hon. Thomas A. Willis, judge.

Patrick Burke sued Robert Anderson in *assumpsit*, for the sum of four hundred and fifty dollars due to him as overseer for the latter. The defendant plead 1st. *non assumpsit*, with notice that under that plea he would prove a loss of $500, occasioned by the plaintiff's destruction of the defendant's property; 2d. that the plaintiff's services were not reasonably worth the sum demanded; and 3d. the following special plea, to wit: "*actio non*, because he says the said plaintiff before, and at the time of the commencement of this suit, to wit, at the county aforesaid, was and still is indebted to the said defendant in a large sum of money, to wit, the sum of one thousand dollars, for the promise and undertaking of the said plaintiff made to the said defendant, to wit: on the first day of January, 1843, in consideration of the loss sustained by the said defendant by reason of the destruction of the chattel of the said defendant, to wit: his negro slave Jim, done and caused by the said plaintiff, to pay the said defendant what sum of money the said

Digitized by Google

negro slave Jim was reasonably worth; and the said defendant avers that said slave Jim was reasonably worth one thousand dollars, which said sum of money, so due, and owing to the said defendant as aforesaid, exceeds the damages sustained by the said plaintiff, by reason of the non performance by the said defendant of the several supposed promises and undertakings in the said declaration mentioned, and out of which said sum of money so due and owing from the said plaintiff to the said defendant, the said defendant is ready and willing, and hereby offers to set off and allow to the said plaintiff, the full amount of the said damages, according to the form of the statute in such case made and provided, and this the said defendant is ready to verify, &c." To this plea there was a demurrer, issues were taken upon the others. The demurrer was sustained by the court below, and the defendant not answering over, a trial was had and verdict rendered for the plaintiff upon the issues.

The defendant prosecutes this writ of error.

H. Cassidy, for plaintiff in error.

The court erred in sustaining the demurrer to the special plea of Anderson. *Houston* v. *Smith*, 2 S. & M. 597; H. & H. 615; *Ray* v. *Woolfolk*, 1 S. & M. 523; 1 Bouv. Law Dic. 380, and authorities cited. 2 Term R. 37; *Esting* v. *Scott*, 2 Johns. R. 156; 1 Chit. Pl. 115; Comyn on Con. 12; Chit. on Con. 7; Comyn's Dig. tit. action on case upon assumpsit, b. 1, and cases in those authorities cited; 1 Chit. Pl. 604.

O. J. E. Stewart, for defendant in error.

The demurrer to the special plea was properly sustained. 1 Chit. Pl. (6 Am. ed.) 603, 604; Ib. 601; H. & H. 590, § 7; Chit. Pl. (same ed.) 605.

Mr. Justice THACHER delivered the opinion of the court.

This was an action of *assumpsit* instituted by Burke against Anderson, in the circuit court of Franklin county, to recover the value of one year's wages as the overseer of a plant-

Digitized by Google

ation. Anderson pleaded the general issue, with a notice that he would set off against the account sued upon, the value of a slave alleged to have been killed by Burke during the time that he was engaged as overseer, and also two special pleas, to all of which the plaintiff below replied, and joined an issue. Anderson likewise filed a special plea of set off to the first special count of the declaration. This plea sets up an indebtedness of the plaintiff below to the defendant there, and a promise to pay him one thousand dollars in consideration of the death of defendant's slave, caused by the plaintiff. A demurrer to this plea was sustained by the court below, and the defendant answering no farther, a trial was had, and a verdict and judgment rendered for the plaintiff below. The judgment of the court in sustaining the demurrer is claimed for error here.

In the case of *Houston* v. *Smith*, 2 S. & M. 597, this court held that a special plea of set off in an action of *assumpsit*, may properly be treated as a nullity. But although the plea be a nullity, after it has been made the subject of a demurrer, and the demurrer is permitted to stand, the plea cannot afterwards be treated as a nullity. *Walker* v. *Walker*, 6 H. 500; *Marlow* v. *Hamer et al.* Ibid. 189. Yet, notwithstanding, a plea which is a nullity, if met by a demurrer, can no longer be treated as a nullity so as to permit the demurrer to pass unanswered and undisposed of, yet it may be considered in that light in passing upon a demurrer filed to it, and it being such a defence, as from its intrinsic nature, a judgment according to law cannot be given sustaining such a plea; a demurrer to it will therefore be sustained, although the plea be technically correctly pleaded. H. & H. 615, § 6.

Judgment affirmed.

Digitized by Google

ARTHUR SMITH *vs.* SAMUEL PRESTIDGE and ELIZA A. PENDLETON, administrator and administratrix of Z. E. Pendleton, deceased.

In an action of trover for a note payable to bearer, the possession by the defendant of the note, will be *prima facie* evidence of his ownership; which will not be rebutted by proof that the note formerly belonged to the plaintiff. It seems it would be otherwise if the note were payable to order and not indorsed.

Where a holder sues on a note and his title is properly questioned, he must make out his title; but when the holder is sued for a note payable to bearer, his possession will be a sufficient protection, until a better title is shown.

IN error from the Lawrence circuit court; Hon. Thomas A. Willis, judge.

Samuel Prestidge and Eliza A. Pendleton administrator and administratrix of Zebulon E. Pendleton deceased, sued Arthur Smith in an action of trover, for a note described in the declaration as follows, viz.: "a certain promissory note in writing, of great value, to wit, of the value of six hundred and six dollars and $\frac{86}{100}$, and drawn by one H. B. Sutton and Solomon Sutton, whereby the said H. B. Sutton and Solomon Sutton promised to pay the said Zebulon E. Pendleton, or bearer, a certain sum of money, to wit, the sum of six hundred and six dollars and eighty-six cents, on or before the first day of January, 1840, for value received.

The defendant plead not guilty, and afterwards withdrew his plea and craved oyer of the letters of administration. A trial was had without any other plea being filed, which resulted in a verdict for the plaintiffs below.

It appears, by the bill of exceptions, that on the trial it was proved that the note sued for was in the possession of the plain-

Digitized by Google

tiff's intestate sometime previous to his death; but at the time of his death, the witnesses stated they did not know in whose possession the note was or who owned the note, which was payable to Z. E. Pendleton, or bearer. After the death of Pendleton the note was found in the possession of Arthur Smith, the defendant, who claimed it as his property. This was all the proof. Whereupon the court instructed the jury that "if they found the note sued for to have been once the property of Pendleton, and no proof had been adduced that he ever parted from the ownership of it, and moreover, that the defendant had not shown how he came into possession of the note, they must find for the plaintiff." To this instruction exceptions were taken, a new trial moved for and overruled, and this writ of error prosecuted by the defendant Smith.

John D. Freeman, for plaintiff in error.

1. The court erred in permitting a trial when no issue was made up and when a demand of oyer was pending and not given by plaintiffs. Gould's Pleading, 434, sec. 36; Ib. 440, 442, sec. 43.

2. The court erred in overruling the motion for a new trial. It was proved by plaintiffs that "sometime previous to Pendleton's death he was in possession of the note sued on," but there is no proof that the note was Pendleton's property at that time, nor is there any proof that he owned or held the note in possession at his death. The note was made payable to bearer. The defendant was the bearer, the possession of the note by him was evidence of ownership by him, and the mere fact that Pendleton, in his lifetime possessed the note, does not rebut the legal presumption of title in the defendant. The note was transferable by delivery; the party from whom defendant received it is dead, his administrators know nothing of the consideration received for the note by their intestate; the transaction is buried with Pendleton, and the defendant relies on the possession of this negotiable note as evidence of his title. If the possession of the note by Pendleton in his lifetime was evidence of property in him, surely, possession of the note by

Digitized by Google

defendant after Pendleton's death, is evidence of title in defendant.

3. The court erred in its instructions to the jury, that if "defendant did not show how he came into possession of said note, they must find for plaintiffs." The note was payable to bearer and transferable by delivery; its possession by defendant was evidence of ownership until plaintiffs proved a better title in their intestate.

J. F. Foute, on same side.

Upon the state of facts the charge given by the court is certainly an erroneous charge. A promissory note payable to bearer is transferable by delivery, and the holder has all the rights thereto, and power to collect, sue, or transfer that belonged to the person to whom it was originally delivered, and whose name may be used as payee.

The possession of a chose in action, or note payable to bearer is evidence of title thereto, and this presumptive evidence is so strong that it shall stand in support of the holder's right, until other evidence is introduced impeaching or casting just suspicion on the holder's title.

The honesty of purpose and integrity of action of all men, are to be taken for granted, and are presumed by the law until the contrary is proved.

These principles so reasonable, just, and convenient, are supported by common sense, immemorial usage and almost innumerable authorities, a very few of which are respectfully offered for the consideration of the court. See 1 Greenleaf's Evidence, 39, sec. 33; 40, sec. 34; 42, sec. 35; 45, sec. 38; 95, sec. 80; and the numerous authorities there referred to.

All those principles and authorities are most palpably disregarded, and set at naught by the charge given by the court below; and the court in effect, charged the jury that they must presume, without any proof, that the defendant obtained the note improperly, without right, and held it unjustly and in fraud.

If, as we believe, this charge was manifestly erroneous, then

Digitized by Google

the court should have granted the new trial prayed for, and the refusal to do so was also error.

We might call the attention of the court to the fact that the record shows no issue for a jury to try. The defendant's plea was withdrawn by leave of the court, and defendant prayed oyer of plaintiff's letters of administration; this oyer was not given; no issue was made on the plea filed and withdrawn; no judgment by default was taken by plaintiffs; no writ of inquiry of damages was awarded; and so in fact there was neither issue to try, or inquiry to be made by the jury. Yet the jury were sworn to try the issue, and found as upon an issue; all which is certainly erroneous.

W. P. Harris, for defendants in error.

The facts proved constitute such a *prima facie* case as would throw upon the defendant the burden of proving how he became possessed of the note. In the ordinary action to recover the value of a chattel, the plaintiff is required to prove first, ownership; second, conversion by the defendant. In the present instance these facts were proved, or at least there was sufficient evidence to authorize a jury to infer these facts in the absence of any other evidence leading to a different conclusion.

It is true, as asserted by the counsel of the plaintiff in error, that possession of a promissory note, transferable by delivery, is *prima facie* evidence of ownership, and without evidence to the contrary, is sufficient, in an action against a party liable on the note, to entitle him to recover.

But in a controversy between adverse claimants to property in the note, the same rule of evidence does not apply, and possession in such a case of a note furnishes no stronger evidence of title, than the possession of any other chattel.

Choses in action by the common law were not assignable as other chattels, the statutes making them assignable have invested them with a character as to their transferable quality, which approaches to the character of an ordinary chattel. If all restraints as to negotiability were taken off, the effect would only be to place them on a footing with other chattels, and the

Digitized by Google

same rules of evidence would apply. If a note is lost or stolen, and the owner find it in the possession of a third party who asserts a title to it, from the very nature of the case it is impossible for him to prove how or when it went out of his possession; all that he can be expected or required to prove, is that the note was his, and that it passed from him by means which he is unable to explain. But the holder of the note can explain how he obtained the note, so as to enable the court or the jury to say whether he obtained it under circumstances which would entitle him to retain it; this is peculiarly within his power and in his power alone; and should a defendant, under such circumstances, be permitted to withhold all explanation, and to defeat the plaintiff's recovery? The fact that he has it in his power to explain, and will not explain, are circumstances which would authorize a jury to find as they did find in the present case, for the plaintiff. The simple fact that he refused to introduce any evidence to explain his possession, was a circumstance of suspicion, and the jury had a right so to interpret it.

In the case of *Patterson* v. *Hardacre*, 4 Taunton, 114, the court held that where a bill has been lost or stolen, "the holder who sues must prove that he came to the bill upon good consideration." It is usual to require notice that such proof will be demanded, but in the case now before the court the very form of the action was notice sufficient.

It is not necessary in any case, in order to entitle the party to call for proof from the holder, to give any direct evidence of loss; it suffices if such circumstances are shown as satisfy the jury of the fact. Chitty on Bills, 149, 7th edition.

Very slight evidence in such case is required as to property in the plaintiff, so that it be such as would enable a jury reasonably to infer property in the plaintiff. 1 Campbell, 551.

In the case of bank notes circulating as money, the rule, for very obvious reasons, is different, and accordingly in such a case the plaintiff would not only have to prove property in himself and conversion by the defendant, but he must also prove circumstances which would show that the defendant obtained the note *mala fide* or without consideration. Chit. on Bills, 333, 7th edition.

Digitized by Google

From these principles it is believed that the court below was right in giving the construction and in overruling the motion for a new trial.

The plaintiffs proved property, the note being payable to their intestate, and proved to have been in his possession; the assertion of ownership by the defendant was tantamount to conversion. There could have been no direct evidence of conversion, &c., from the nature of the case.

No proof being introduced by the defendant and no explanation by him of the manner in which he came to the note, the jury were clearly justified, under this state of facts, in finding for the plaintiffs.

The other ground taken by the counsel for the plaintiff in error is equally unavailable. At the first term of the court the defendant put in the general issue; this, without any further act by the plaintiff, constituted an issue; it was not necessary to add the *similiter*, and the omission to do so is cured by verdict. The defendants then withdrew their plea, and craved oyer of the letters of administration; that is, the defendant's counsel below say so in the writing which they handed to the clerk at the time.

A plea once filed cannot be withdrawn without leave of the court; the application is addressed to the discretion of the court, and there must be some sufficient reason for granting it. 1 Bibb, 412; 2 Ibid. 22. The withdrawal of the plea then is, by the order of the court, obtained on application, and on a proper showing. And it does not appear in this case that such application had been made, or that the court in any way acquiesced in it; on the contrary, the court treated the case as still standing upon issue joined on defendant's plea filed. The mere statement of the counsel below, as contained in the commencement of their demand of oyer, is not such a withdrawal of the plea as would authorize a judgment for want of a plea. The prayer of oyer, standing alone, without any subsequent step by either party, does not furnish sufficient evidence that oyer was denied; for a party, upon obtaining it, is not required to notice it in his subsequent proceedings, and it often happens

Digitized by Google

that when oyer has been demanded and received, that there is no evidence of the fact found on the record, because the application is made to the opposite attorney, and not to the court. Steph. Pl. 68, 70.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This was an action of trover brought by defendants in error against Smith, to recover the value of a promissory note. It is said the judgment is erroneous because there was no issue. That question, however, is immaterial, as the judgment must be reversed for another cause.

The note, it seems, was made payable to Z. E. Pendleton or bearer, and it was proven to have been in his possession some time before his death, but at the time of his death the witnesses did not know in whose possession it was, or who owned it. After the death of Pendleton the note was found in the possession of Smith, who claimed it as his property. The plaintiff's counsel thereupon moved the court to charge the jury, that if they should find the note sued on to have been once the property of Pendleton, and that there is no proof that he ever parted with it, and moreover, if the defendant has not shown how he came into possession of the note, they should find for the plaintiff, which charge the court gave. This was error. Although the note was made payable to Pendleton, and was proven to have been once his property, yet being made payable to bearer, it was negotiable by delivery. This being the case, the possession of such an instrument is *prima facie* evidence of ownership; it was therefore incumbent on the plaintiff to rebut the presumption of ownership raised by Smith's possession. When a holder sues on a note, and his title is properly questioned, he must make out his title; but when the holder is sued for a note payable to bearer, his possession will be a sufficient protection until a better title is shown.

The judgment must be reversed, and the cause remanded.

Digitized by Google

JOHN DOE ex. dem. R. L. SMITH et uxor *vs.* J. A. BRADLEY et al.

By the law regulating the territory of Mississippi before it was made a state, chancery jurisdiction was conferred on the supreme court; which was a court of general jurisdiction, and the sheriff its officer, who was bound by law to execute its process. Where, therefore, a bill was filed in that court against adults and infants, to foreclose a mortgage, and the process which was directed to the defendants, commanding them to appear and answer, was returned "*served*" by the sheriff, and a decree rendered thereon; *held*, that the process and return were sufficient to uphold the decree.

Where there has been a defective return upon process, it is a question of error or not in the rendering of the decree, and that decree cannot, on account of such defect, be attacked collaterally in an action of ejectment against parties claiming under the decree.

A decree against infants, foreclosing a mortgage, which is rendered without giving a day after their coming of age, to show cause against the decree; and without appointing a guardian *ad litem* for them, or taking the bill for confessed against them, will not for such irregularities be made void.

A decree for the sale of mortgaged premises instead of a technical foreclosure, is binding on an infant, although no day be given, to show cause against it.

An infant defendant can, after he comes of age, only avoid a decree against him by showing errors in the decree; he cannot reinvestigate the subject-matter of the suit, nor can he redeem mortgaged premises which have been sold.

IN error, from the circuit court of Adams county; Hon. C. C. Cage, judge.

John Doe, on the demise of Richard L. Smith and Margaret Smith, his wife, sued Richard Roe, i. e. Joseph A. Bradley and others, in ejectment for Section seventy-five, in Township seven, of Range three, west, in Adams county. A trial was had and verdict rendered for the defendants. From the bill of exceptions it appears, that after the plaintiffs had closed their testimony, the defendants offered in evidence to the jury the record

Digitized by Google

of a suit in chancery entitled *Anthony Cavalier et al.* v. *Tyler's Heirs et al.*, which record exhibited in substance the following facts:

Anthony Cavalier and Peter Pettitt, on the 22d day of November, 1808, filed in the supreme court of the Mississippi territory, before the Hon. Josiah Simpson, judge thereof, in chancery sitting, their bill in chancery, in which they state that Thomas Tyler, then dead, on the 27th day of April, 1802, mortgaged to the complainants, to secure a specified sum of money and interest, certain lands specified in the indenture of mortgage filed with the bill. That in February, 1805, Tyler died intestate, without having paid any part of the mortgage money; leaving Sally Tyler, Polly Tyler, and Margaret Tyler his heirs at law and daughters, at that time and still infants; and Catharine Tyler his widow. That the widow and heirs were in possession of the property; the widow having, since the death of Tyler, intermarried with William Jenkins. The bill prayed that the widow and her present husband and the heirs at law might be made defendants to the bill, and that a decree might be rendered, that unless the defendants paid the money due, at a short day, to be fixed, their equity of redemption might be foreclosed.

Upon this bill the following subpœna issued, viz.:

The Mississippi Territory of the United States.

To Sally Tyler, Polly Tyler, and Margaret Tyler, heirs at law of Thomas Tyler, deceased: and Catharine Jenkins, widow of said Thomas Tyler, and William Jenkins, husband of said Catharine, Greeting:

For certain causes offered before us in our supreme court in chancery, &c., we command and strictly enjoin you, that, laying all matters aside, and notwithstanding any excuse, you be and appear personally before the judges of our said court in chancery, sitting at the town of Washington, on the fourth Monday in November, 1808, to answer to a bill in chancery preferred against you by Anthony Cavalier and Peter Pettitt, in our said court, and further to do and receive what our said

Digitized by Google

court shall have considered of in this behalf; and this you shall in nowise omit under the penalty of one hundred dollars.

Witness, Peter Brian Bruin, Esq., first judge of our said court, the fourth Monday of May, 1808, and of American Independence the thirty-second. Issued November 22, 1808.

R. R. GRAYSON, *Clerk.*

Indorsed: Received 22d November; November 23d, served for Montford Calvitt, Sheriff. ROBERT PURVIANCE, *Deputy.*

Jenkins and his wife answered the bill, insisting upon Mrs. Jenkins's right of dower in the premises; she not having been a party to the mortgage deed. The court appointed commissioners to allot the widow her dower, and proceeded to enter up a decree "subject to the widow's dower." That decree was as follows, viz.:

"And now at this day, to wit, on Thursday, the fifteenth day of October term, in the year eighteen hundred and twelve, this cause coming on to be heard in presence of the Hon. Josiah Simpson, presiding judge of said court, and of the counsel on both sides, whereupon, on hearing the complainants' bill read and the said bond and mortgage therein, in part recited, and also the defendants' answer, and what was alleged by the counsel on both sides, it was decreed that the said defendants do, on or before the twentieth day of December next, pay or cause to be paid to the said complainants, the sum of four thousand five hundred and twenty-seven dollars, being the amount of the sum of money mentioned in the condition of the said bond and mortgage, including interest thereon up to the said 20th day of December next; and in default thereof, that the equity of redemption of the representatives of Thomas Tyler and of all persons claiming under, of, in, and to the said mortgaged premises, be forever foreclosed, (except so far as relates to the right of dower of the said widow of the said Thomas Tyler,) and that the sheriff of Adams county be authorized to expose to sale at public vendue to the highest bidder, for cash, the said mortgaged premises, giving thirty days previous notice of the time and place of sale, by advertisement published in some newspa-

Digitized by Google

per printed in the city of Natchez, and to sell the same, (subject to the right of dower of the said widow of the said Thomas Tyler,) and on the sale thereof to make and deliver all such deeds as may be necessary to convey to the purchaser or purchasers thereof the title thereto, and the proceeds of such sale to pay over to the said complainants or their counsel in discharge of the said debt and costs of suit, and the residue, if any, to have here in court at the next succeeding term thereof.

"JOSIAH SIMPSON."

Under this decree, the clerk of the court issued to the sheriff an order to sell the mortgaged premises; describing them. The sheriff received and returned the writ, with the report that he had sold the mortgaged property, (which included the property in controversy,) and which had been purchased by the complainants in part discharge of the debt due to them, and filed a receipt of the complainants' counsel for the purchase-money.

To the reading of this record the plaintiffs below objected, and their objection being overruled, they excepted and prosecute this writ of error.

Montgomery and *Boyd*, for plaintiffs in error.

Under the circumstances, we contend the decree was void. That the only persons whose rights are decreed against were not parties to the record.

The court will observe the subpœna was not directed to the sheriff. If the process had been directed to the sheriff, we might have been justified in the presumption that some rule of court, or statute now lost, made it the duty of the sheriff; but as it is in the form of English chancery process, and no direction to the sheriff, we are bound to consider it subject to the rules of English courts, which at that day required the service should be proved by the affidavit of the party who made it. 2 Smith's Ch. Pr. 514.

We do not question that the service by the sheriff or any other person would have been sufficient, but as it was not an official duty or power, his return is of no higher authority than a similar return by a private person. His return should have

Digitized by Google

been made on oath, and in the form or to the effect prescribed by the rules. The Act of 1807 on the subject leaves the matter where we find it in the books of practice. Turner's Dig. 142, § 34. The authority by which the sheriff acts at the present day is to be found in statutes of 1822. Revised Code, 88, § 19.

But the return was not sufficient, if the sheriff was authorized to execute the process. It is simply "*served.*" 1 Hoff. Pr. 171, 172; Ibid. 105, 106, 115, 116.

But if the service was sufficient, can any valid decree be rendered against an infant without an appearance?

From the authorities it appears very clear such decree would be erroneous. When the defect is noticed by the court, it is an ancient rule and has been the general practice, that no decree can be taken against an infant without giving a day to show cause against it, after coming of age; and he is to be served with process for that purpose on coming of age. 3 Johns. Ch. R. 367; Bingham on Inf. 118, ut sup. Why have courts adopted the practice of appointing a guardian *ad litem?* Why the rule that a decree shall not be final until after they have had an opportunity to show cause against it after coming of age, if a final decree will bind them, rendered during tender years, when no person represented them? The bill shows that the defendants were minors; no decree, therefore, should have been rendered without an appearance; and a guardian *ad litem* was alone competent to enter an appearance. And without an appearance the court had not jurisdiction of the parties; and therefore its decree is void. 1 Barbour's Pr. 77.

Quitman and *McMurran*, for defendants in error.

1. As to the service of the process in the chancery suit, the record of which defendants gave in evidence, there is no dispute. The subpœna issued against Mrs. Smith and the other defendants, and is returned served. This is sufficient. 6 How. R. 661, 664.

2. Then we contend for the principle that it is the service of the process on an infant (as well as an adult) defendant, which

Digitized by Google

gives jurisdiction of the person to the court, and that the non-appointment of a guardian *ad litem* is only a matter of error, for which the judgment or decree may be reviewed or reversed by bill of review, and by an appeal or writ of error, in the mode pointed out by the statute. The decree may be voidable, it is not void, and the proceedings were admissible in evidence. H. & H. Dig. 571, 572, § 102, 103; *Jones* v. *McGinty*, 3 Dana's R. 425; *Shropshire* v. *Runo*, 5 Dana's R. 583, 584; *Collins's Heirs* v. *Groom*, 2 J. J. Marsh. R. 487; 2 Munf. R. 129; 14 Johns. R. 417.

But the authority to be found in the case of *Porter's Heirs* v. *Robertson*, 3 Marsh. R. 253, 254, is directly in point, and in our opinion decisive of this case.

A very clear and strong decision, showing the distinction between void and voidable judicial proceedings, when brought before courts collaterally, as in the present case, will be found in the case of *Voorhees* v. *Bank of U. States*, 10 Pet. R. 449, 469, 473. So also the principle, decided in the case of *Tomlie* v. *Thompson*, 2 Pet. R. 163, 168, applies with great force in the present case, where the suit is instituted some thirty years after the sale of the property.

These authorities show, too, that a party shall not be permitted to do indirectly that which he is barred from doing directly from lapse of time or by express statute.

A bill of review or writ of error must be prosecuted by the infant within two years after arriving at the age of majority. H. & H. Dig. 571, 572, § 102, 103.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The plaintiffs brought ejectment for a tract of land in Adams county, being Section No. 75, in Township No. 7, of Range No. 3, west. After closing their proof, the defendant offered in evidence the transcript of a record of a suit which had been instituted and decided on the chancery side of the supreme court of the Mississippi Territory. The bill was filed by Anthony Cavalier, against the widow of Thomas Tyler, and his infant daughters Sally, Polly, and Margaret, the latter being the wife

Digitized by Google

of R. L. Smith, and one of the present plaintiffs, to foreclose a mortgage executed by Tyler in his lifetime, on the tract of land in dispute. Process issued against all of the defendants, which was returned by the sheriff of Adams county, "served." The widow answered, but the infants failed to answer, nor was a *pro confesso* taken against them, or guardian *ad litem* appointed. A decree, foreclosing the equity of redemption, and for the sale of the premises, was rendered, saving the widow's right to dower. The land was sold, and the defendant claims title under the purchaser. The plaintiffs' counsel objected to the introduction of this record, and took exceptions, and its admissibility constitutes the ground relied on for reversing the judgment.

Several objections are raised to the record, which, it is insisted, make the decree absolutely void; and being so, it was not competent as a matter of evidence. These are, that no process was executed on the infants; that a decree was rendered against them, without appointing a guardian *ad litem*, and that the decree contains no saving in their favor after they should become of age.

Although the process was returned by the sheriff "served," yet it is contended that it was not directed to him, nor was it part of his official duty to execute chancery process. It is further insisted, that service on infants must be personal, and must appear so to have been made.

Under the statute law, as it at present stands, all process emanating from the superior court of chancery, is directed to the sheriff, and it is part of his official duty to execute and return it. H. & H. Dig. 508, sec. 19. But it is said this law was passed in 1822, prior to which there was no statutory provision, and consequently that chancery process was served according to the English practice, according to which this service was insufficient. It is undoubtedly true, that if the court had not jurisdiction of the persons, as well as the subject-matter of the suit, the decree was void and improperly admitted; but if the decree was only erroneous, it cannot be collaterally questioned; it is binding so long as it remains unreversed. The

Digitized by Google

sufficiency of the service is consequently an important question, as the subject-matter was evidently within the jurisdiction of the court.

Although the English practice in regard to the service of process has been examined with some care, yet we think the question rests upon a foundation less doubtful, and therefore prefer to place it on that alone. By the law of the territory, chancery jurisdiction was conferred on the supreme court, as there was not then a separate court of chancery. This was a court of general jurisdiction, and the sheriff was its officer. He was bound expressly by law to execute all its process. Toulman's Dig. 219. This was the law as it stood during the pendency of the chancery suit. By all process we must understand every description of process which the court might issue in the exercise of its common law jurisdiction, or its chancery powers. This process emanated from that court, and it was served by the sheriff, who was its officer. Although not specially directed to him in the body of the process, yet the law directed it to him by general provision. It is not the mere direction of process to the sheriff which gives him power to act; he derives his power from the law, and must act in accordance with its mandate. Being his duty to return process, his returns are to be regarded as made under oath, and are sufficient to justify the court in proceeding to judgment. Whenever service is required to be made in a particular way, if the manner of service is attempted to be set out, it must show that the directions of the law have been complied with. But if a sheriff make his return general, "executed," or "served," a legal service is understood; that is, that it has been served according to law. This is according to the course of the recent decisions of this court; and we see no reason why the same rule should not be applied to the returns made at an earlier day in our judicial history. By this rule we must hold this return to be sufficient. But if it were even a defective return only, that would be a question of error or no error.

But it is insisted that, for the other objections pointed out, the decree was void. In decrees against infants it is usual, and

Digitized by Google

indeed generally necessary, that a day should be given after coming of age, to show cause against it. 2 Peere Williams, 120; 1 Ibid. 504; 2 Vesey, 484. But how can an infant avoid a decree after coming of age? Only by showing errors in the decree. He cannot reinvestigate the subject-matter of the suit, nor can he redeem mortgaged premises which have been sold. *Matlock* v. *Gatton*, 3 Peere Williams. But a decree for the sale of mortgaged premises, instead of a technical foreclosure, is binding on an infant, although no day be given. 2 Vernon, 429. This was a decree of that kind; it was a decree for the sale of the premises on failure to pay the money. If such decrees be binding on infants, it is clear that the failure to appoint a guardian *ad litem*, and the omission to take a *pro confesso*, are not such irregularities as will make the decree void. For these errors the decree probably might have been reversed, but that is not now the question. The decree being then, at most, irregular, the transcript of the record was properly admitted, and the judgment must therefore be affirmed.

Digitized by Google

Robert Jack *vs.* The State of Mississippi.

J. having a claim against the state, the legislature passed a law by which the governor, the auditor, and commissioner of public buildings were authorized to examine J.'s accounts, and to make him such allowance as they might find him entitled to: *Held*, that if J. assented to the law by having his account examined under it, and they decided against him, he was precluded from making further claim.

Where a bill was filed by J. against the state, to recover the amount of an alleged indebtedness, to which the state, by her officer, answered that the legislature had by law authorized the governor, the auditor, and commissioner of public buildings to examine J.'s accounts, and make him such allowance as they might find him entitled to; and that they had examined J.'s accounts, and found that there was nothing due him; *held*, that the answer of the state, setting up this matter in avoidance of the bill, must be established by strict proof; and the certificate of these officers to the effect set up in the answer, but which did not state that J. submitted his accounts to them for examination, or was present when his accounts were exhibited, will not be sufficient evidence to maintain the answer.

On appeal, from the decision of the superior court of chancery; Hon. Robert H. Buckner, chancellor.

Robert Jack, on the 8th day of September, 1842, exhibited his bill against the state, averring that in the year 1841 he was employed by the state to make a large number of drawers, cases, pigeon-holes, slides, &c., for the purpose of holding the papers, &c. belonging to the room appropriated for the auditor's office; for which work he was to be paid its reasonable worth; that on the 20th day of May, 1841, he completed the work and delivered it to the state, which had used it ever since. That this work and materials furnished were worth $2822. That on the 20th day of May, 1841, the state owed him for other previous work the sum of $1617 30, under a contract made in the years 1839 and 1840, for which the commissioner of public buildings had given him a certificate; that the state being thus indebted to

Digitized by Google

him, he applied to the auditor for warrants in payment of the debt due him; the auditor issued him warrants for only $2200, leaving a balance still due of $2239, for which he prayed a decree against the state.

John D. Freeman, Esq., attorney general, answered the bill on the part of the state, denied that Jack was employed to do the work for which he claimed payment, by any authorized agent of the state; but admits that the work was done by Jack and used by the state; denies that Jack furnished any of the materials, or was entitled to $2822 for the work; or that the state owed him for previous work $1617 20. That all the work and materials ever furnished or done by Jack for the state, were worth the sum of $5006 96, and no more; and that the state had paid him the sum of $5200. That during the session of the legislature of 1842, the complainant presented all his claims against the state to the legislature for allowance; that the legislature did not allow the claim, but passed an act, entitled "an act making appropriations for certain persons therein named;" wherein among other things it was provided as follows, viz.: That the governor, auditor of public accounts, and commissioner of public buildings of the state, should examine into the account of the complainant, for work done in the auditor's office and representatives hall, and if they should think him entitled to any compensation in addition to the two thousand two hundred dollars already allowed him, they should make such allowance as to them might seem proper, not exceeding the sum of sixteen hundred dollars, which sum, when allowed, was thereby appropriated. This act was approved February 28, 1842. That subsequently to the passage of the act, the complainant voluntarily and repeatedly requested the parties named in it to examine his accounts, and insisted on their doing so; they accordingly appointed a day for that purpose, and gave notice to the complainant to be ready with his witnesses to prove his claim; that on that day the complainant appeared before them with his accounts and witnesses; that after hearing all the evidence and examining all the proof, it appeared satisfactorily to the governor, auditor, and commissioner of public buildings, that the

Digitized by Google

state had overpaid the complainant in the sum of one hundred and ninety-three dollars and four cents, which sum was due the state by the complainant; their award filed with the answer, was in these words, viz.:

"We, T. M. Tucker, James E. Mathews and R. S. Graves, having been appointed by an act of the legislature, approved 28th February, 1842, to examine into the accounts of Robert Jack, for making desks in the representative hall and work in auditor's office, do hereby certify that we proceeded to examine all of said Jack's accounts which he produced against the state, and after examining the witnesses introduced by said Jack on oath, as to the value of his work, we awarded him as follows: (Here follows in the award a detailed statement of the mutual accounts; the debit side against the state amounting to $5006 96; its credit side being $5200.) Making amount paid Jack more than allowed, $193 04.

T. M. Tucker,
James E. Mathews,
Richard S. Graves."

The complainant took testimony by which he fully established the truth of his accounts exhibited with the bill; it is not deemed necessary to set it out at length.

Upon this state of pleadings and proof, the cause was submitted for final hearing. The chancellor dismissed the bill and the complainant appealed.

W. Yerger, for appellant.

The pretended action of the commissioners under the act of 1842, set up in avoidance of the complainant's claim, will be necessarily disregarded by the court in its decision, upon the well-known rule in equity, that all matters in avoidance, not being responsive to the allegations of the bill, must be proved, or otherwise the same will be disregarded. 2 Stew. R. 280; 2 McCord's Ch. R. 156; 1 Gill and Johns. R. 272.

Under the general authority given to the auditor, and the duty

Digitized by Google

enjoined upon him to file and preserve in his office the receipts, vouchers, accounts, &c. pertaining to his office, he would have had power to employ complainant to do the work done by him in the auditor's office, without any special authority for so doing. H. & H. Dig. 270; 2 Brock. R. 110.

And upon the pleadings and proof, it seems to me that there can be no doubt as to the complainant's right to the relief asked for.

A doubt has been suggested as to the jurisdiction of the chancery court in this case, which doubt has grown out of the act of the legislature of 1842, appointing the governor, auditor and treasurer, commissioners to examine into the account of complainant, and to allow it, if deemed just by them. If I did not misconceive the doubt of the chancellor, he thought that this law, creating a special board of commissioners to try this claim, operated *pro tanto* a repeal of the general law. Upon an examination of the constitution, and those principles of the law deemed applicable to this case, I am satisfied all doubt must vanish from the mind of the chancellor.

The tenth section and seventh article of the constitution declares, that "the legislature shall direct by law in what manner and in what courts suits may be brought against the state."

This power was exercised by the legislature of 1833, which directed suits to be instituted in the chancery court against the state." H. & H. 523.

The legislature could not, without a palpable violation of its duties, have omitted "to direct by law in what court suits might be brought against the state." 3 Story on Constitution, 449; 1 Wheat. R. 304-316.

The constitution further provides, that "the powers of the government of the state shall be divided into three distinct departments, and each of them confided to a separate body of magistracy, to wit, those which are legislative to one, those which are judicial to another, and those which are executive to another;" and "no person or collection of persons being of one of these departments, shall exercise any power properly belonging to either of the others." Art. 2, sec. 1 and 2.

Digitized by Google

Now it is manifest, that the act of 1842 is palpably unconstitutional and void, if it were thereby intended to confer upon the governor, auditor and treasurer, the powers of a court, to hear and determine this question. It is clear, however, that the legislature only intended to create a board of commissioners, to whose decision the complainant might or not, according to his pleasure, submit his case for decision.

But again, if it be contended that this act of the legislature were intended to take away the right of complainant to bring suit against the state in the chancery court, it is a palpable violation of the fourteenth article of the declaration of rights, which declares, that "all courts shall be open," &c., and being partial in its nature, operating only upon one individual, and taking away a general right conferred by the constitution upon all citizens, is clearly void. 2 Yerg. R. 524, 599.

If it be admitted, however, that the legislature intended by this act to create another court, with power to hear and determine the complainant's claim, and that such law be constitutional, still complainant's right to avail himself of the general law of the land and the courts open to all citizens, is not taken away unless express negative words be used for that purpose.

On this subject the rule of law seems to be universal, that where a statute gives an affirmative remedy, without a negative, express or implied, for a matter which was actionable at common law, or for which there existed another statutory remedy, the party may still pursue the remedies which he had previous to the passage of the last named statute; the remedies being deemed cumulative. 5 Johns. R. 175; 9 Ibid. 507; 10 Ibid. 389; 15 Ibid. 220; 5 Cow. 165; 9 Ibid. 437; 10 Wend. 441.

John D. Freeman, attorney-general, for the state.

The plaintiff had submitted his account to the legislature, to be audited and allowed; that body appointed referees to settle the claim, and plaintiff agreed to the appointment, and submitted his claim to them. He now files his bill in chancery, regardless of the award of the referees. This is error. See Am. Chancery Digest, Title Award, and cases there cited.

Digitized by Google

On the point of jurisdiction it appears from the answer, that in the year 1842 Jack presented his claims against the state to the legislature for settlement, and that the legislature appointed the governor, auditor, and commissioner of public buildings, to examine said claim, and to allow said Jack such sum as said commissioners might think to be due him, not exceeding $1600, which sum was appropriated to pay said Jack's claim, when ascertained by said commissioners.

Jack submitted his claims to said commissioners, who find him overpaid by the state; he then filed his bill in chancery, and the attorney-general plead a previous adjudication in bar of the jurisdiction of the court.

The legislature is empowered by the constitution to direct by law in what manner, and in what courts suits may be brought against the state. See sec. 10, art. 7.

In 1833 a general statute was passed, allowing persons having claims against the state to file bills in chancery. In 1842, a special statute was passed, appointing commissioners to hear and determine Jack's claim.

The right of the legislature to pass these acts is derived from the clause of the constitution above quoted. They direct in what manner and in what courts suits may be brought against the state. It is a well settled rule of interpretation, that a special statute in derogation of a general statute, is an exception to the general statute. The special statute therefore, appointing a tribunal to try Jack's claim, took away his right to file his bill in chancery acquired by the general law of 1833.

The provision in the 14th article of the declaration of rights, that "all courts shall be open," &c., does not apply to cases wherein the state is a party. The state can only be sued by her own permission, and in the manner directed by law.

It is contended, by the opposing counsel, that the legislature had no power to create a court to try Jack's claim. By the 24th section of article 4th of the constitution, it is provided, that the "legislature may, from time to time, establish such other inferior courts as may be deemed necessary, and abolish the same," &c. This power is conclusive against the position above stated.

Digitized by Google

PER CURIAM. The complainant filed his bill to recover of the state the value of cabinet work done in the capitol. He claims the sum of $2822 for cases, drawers, &c. for the room appropriated as the auditor's office; and he also alleges that the state was previously indebted to him in the sum of $1617 for work previously done, and to support the last charge, exhibits the certificate of the commissioner of public buildings, by which the charge is fully established. The attorney-general answered denying the indebtedness, and relied also in the answer on an act of the legislature passed in 1842, by which the governor, the auditor, and commissioner of public buildings were authorized to examine Jack's accounts, and to make him such allowance as they might find him entitled to. The answer avers that complainant had his accounts examined under the provisions of this act, and it was found by the individuals appointed, that he had been overpaid. There was such an act passed as that described in the answer, and if Jack assented to the law by having his accounts examined under it, he is precluded from making further claim. As an award it would bind him. But it is said this part of the answer was not responsive to the bill, and being a matter in avoidance, strict proof of the truth of so much of the answer was necessary. This is the true principle, and it applies in the present case. The complainant introduced proof that he had performed the work charged, and that at the current rates it was worth the sum claimed; but the attorney-general omitted to introduce any proof of the submission of Jack, or of his appearance before the commissioners, except their certificate, which is but an exhibit, and not competent proof that Jack appeared before them. Indeed the certificate or award does not state that he appeared or was present. It only states that they examined his accounts, and his witnesses. This might have been done without the knowledge or approbation of Jack, as his accounts or copies may have been presented to some of the public officers. Still it is possible Jack may have submitted his accounts for examination. If so, he is bound by the award, if it was fairly made. Whether an inquiry into such fact may be proper on the taking of an account, if one

Digitized by Google

should be ordered, we need not now decide. The decree must be reversed, and the cause remanded to the superior court of chancery for further proceedings; when, if it be made to appear that Jack was present or submitted to the arbitration, he will not be entitled to a decree in his favor.

Digitized by Google

S. H. BUCKINGHAM et al. *vs.* JAMES OWEN.

O., in February 1840, obtained judgment at law against G. & B. S., as administrators of M. S., deceased; in July 1839, G. & B. S. had resigned their letters of administration, and J. R. G. been appointed administrator *de bonis non* of M. S., and was in that office when judgment in favor of O. was rendered: *Held*, that the judgment in favor of O. thus obtained was neither binding upon the estate, nor upon J. R. G. the administrator, and was a nullity.

The sureties of an administrator upon his official bond cannot be sued in equity by a judgment creditor, for a *devastavit* committed by the administrator; the remedy of the creditor is by action at law upon the bond.

G. & B. S. administered upon the estate of M. S., when O. obtained judgment at law against them as such administrator; G. & B. S. resigned their office, and J. R. G. was appointed administrator *de bonis non*, took possession of the estate, used and wasted the assets, and died insolvent, and without personal representatives; D. was appointed administrator *de bonis non* of M. S., and represented the estate insolvent; whereupon O. filed his bill in chancery, against the sureties of J. P. G. on his bond, to compel them to pay his judgment: *Held*, that a court of chancery had no jurisdiction of the bill.

ON appeal, from the vice chancery court at Fulton; Hon. Henry Dickinson, vice chancellor.

James Owens filed his bill, alleging that on the 28th day of February, 1840, he recovered, in the circuit court of Monroe county, in this state, a judgment for the sum of $1832 70, against George W. Sims and Bartlett Sims, administrators of Matthew Sims, deceased; that on the second day of July, A. D. 1839, the said George and Bartlett Sims resigned their letters of administration, and one John R. Greer appointed administrator *de bonis non*. That William Hill, Charles M. Weaver, Sterling H. Buckingham, William Smith, and London J. Carter, were securities on the administration bond of Greer; that Greer

Digitized by Google

took possession of the goods, chattels and effects of Sims unadministered; that he collected a large amount of money due the estate and applied it to his own use, and disposed of it not in liquidation of his intestate's debts; and that in the administration of the estate, Greer had committed a *devastavit*, for which he and the sureties on his bond were liable to answer; that Greer died about the middle of September, A. D. 1840, intestate and wholly insolvent, and no person had taken out letters of administration upon his estate; that after the death of Greer, on the 21st of December, 1840, Reuben Davis was appointed administrator *de bonis non* upon the estate of said Sims, and had reported the estate insolvent to the probate court; that the debt and costs evidenced by the complainant's judgment, were still due; and the bill therefore prayed that the sureties on the bond of Greer might be compelled to pay the said judgment and costs.

The defendants demurred to the bill for want of jurisdiction; the court below overruled the demurrer, and the defendants appealed.

Davis, for appellants.

J. M. Acker, for appellee.

The complainant being a stranger, and not a creditor of Greer, had no right to become the administrator. He stands in attitude of creditor of Greer's intestate, and not as creditor of Greer; and even though he had administered, he would have stood in the unenviable attitude of trying to fix a liability on himself as administrator, for the use and benefit of himself as a private individual, and as creditor of the estate of which his intestate was administrator. Neither has any court in this state the authority to administer, or of compelling any person to administer, as in some states in the union.

The defendants, as securities of Greer, agreed and undertook to make up any defalcations that he might commit while acting as administrator. The law does not make them, by virtue of signing the bond of the administrator, officers of the court

Digitized by Google

of probates; the court of probates has no jurisdiction over them; it cannot reach them by citation or bring them before it for any purpose. The liability must be first fixed upon their principal, the administrator, before they can be reached. This liability must be fixed in the probate court. See *McRea* v. *Walker*, 4 How. R. 455; *Green* v. *Tunstall*, Ibid. 638. Now it is evident that the estate of Greer must be represented before any liability can be fixed upon it. The complainant has no power to create a representative of the estate of Greer, nor to fix, without such representative, any liability on his estate; nor can his securities, the defendants, be reached until such liability is fixed on their principal. See *Probate Court* v. *Phipps*, 5 How. R. 59; *Carmichael* v. *Browder*, 3 Ibid. 252, and cases above cited from Howard's reports. This case presents a legal right without any legal remedy. That the probate court has full jurisdiction in all matters of probate, and matters testamentary, is admitted; but the constitution gives the superior court of chancery "full jurisdiction in matters of equity." And I lay it down as a correct position, that although a case may have sprung from a matter testamentary, yet the chancery court would entertain jurisdiction if there is no satisfactory remedy in the probate court. This is a case most peculiarly within the jurisdiction of a court of equity. There is no remedy at law; none in the probate court, for want of an administrator of Greer. It is everywhere decided that a court of chancery will entertain jurisdiction where there is a right, and no legal or other remedy, or if the court of equity can afford a remedy more full, ample and complete, than any other tribunal. It is believed that no parallel case to the one under consideration has been decided by our high court of errors and appeals. The law books furnish but little authority for the appellees, and none, as is believed, for the appellants. The chancellor based his decision for the complainants upon the authority of a case reported in 4 Munf. 289. That case is fully parallel with the present, and fully decides and settles the point in controversy. See *Spottswood* v. *Dandridge*, 4 Munf. 289. It is then believed that inasmuch as the chancery court has full jurisdiction

Digitized by Google

under our constitution over all matters of equity, and that although the probate court has jurisdiction in all matters testamentary, yet it does not take away any jurisdiction by the common law peculiarly conusant in a court of equity; that the remedy is in chancery, and not in the court of probates.

Mr. Justice CLAYTON delivered the opinion of the court.

This is an appeal from the vice chancery court at Fulton.

The bill alleges the recovery of a judgment in the circuit court of Monroe county, in February, 1840, against George and Bartlett Sims, as administrators of Matthew Sims, deceased, but that previous to said judgment, in July, 1839, the said administrators resigned, and one John R. Greer was appointed administrator *de bonis non* of the said estate. It also alleges that Greer wasted a large portion of the assets which came to his hands, leaving not enough to pay the debts of the estate; that he has died insolvent, and that there has been no administration upon his estate; that Reuben Davis has since become administrator *de bonis non* of the estate of Sims, and has suggested its insolvency. This bill is filed against the sureties of said Greer, the plaintiffs in error, to compel them to pay the judgment of the complainant.

There is a general demurrer to the jurisdiction of the court, which is the sole question for consideration, and which was overruled in the court below.

The judgment against George and Bartlett Sims, rendered some six months after their connection as administrators had ceased with the estate, was not binding either upon the estate or upon John R. Greer, the administrator *de bonis non*. Indeed, it was a nullity. No execution was ever returned upon it. If the judgment had been against Greer, the administrator, the right of the complainant against the estate, would then have been established.

But even in that attitude of case, we do not see upon what principle the jurisdiction of a court of chancery could be sustained in this state over the subject-matter. The case of *Spotswood* v. *Dandridge*, 4 Munford, relied on in argument, cannot

Digitized by Google

have the effect to establish such doctrine here. In some of the states it is settled that courts of equity have concurrent jurisdiction with courts of law, in suits against executors. 4 Johns. Ch. R. 631. The jurisdiction exercised by the court of chancery in Virginia, is upon this principle. But a very accurate writer of recent date, says that the court of appeals of that state now manifests a strong tendency to exclude from the jurisdiction of equity, all cases in which a full remedy can be had at law. 2 Rob. Pr. 38. In the case cited, as well as in *Sampson* v. *Payne*, 5 Munf. 176; and 2 Hen. & Munf. 8, the bills were filed for a discovery, and account of assets, and were retained in equity, to have the whole matter settled there, to avoid circuity of action. This bill does not even contain that prayer, which was probably essential to the jurisdiction in that state.

A bill was filed in the probate court of Claiborne county, against the administrator and his sureties for a discovery and account of assets, and for distribution. The object was similar to that in view in this case. *Green* v. *Tunstall*, 5 How. The very authorities cited to sustain this bill, were cited in the argument of that cause. The court decided that the remedy upon the bond, was exclusively in a court of law.

The chancery court erred in overruling the demurrer, and in entertaining jurisdiction. The decree is therefore reversed, and the bill dismissed.

Digitized by Google

CHARLES ANDERSON *vs.* COLLIN S. TARPLEY.

14 507
77 656

Where a debt was contracted with a firm, and one of the partners sued for it in his individual name, declaring on it as a debt due to him, the defendant can avail himself of the fact of the debt having been contracted with the partnership, only by plea supported by affidavit, (H. & H. 595.)

Idem, if a firm sue for a debt due one of the partners, or an executor sue in his individual capacity for a claim due to his testator.

If a claim be placed in the hands of two attorneys, practising in partnership, and before any steps are taken in the collection of the claim, the firm dissolve and one of the members take charge of the claim and render all the services in its collection, and sue individually the owner of the claim for his fees for so doing, the jury will be justified in inferring that it was part of the contract of dissolution between the partners, that the one who has rendered the services should attend to the claim and receive the compensation, and their verdict to that effect will be upheld.

Where, in an action upon an open account for attorney's fees, the jury render a verdict for the plaintiff; and at the trial the defendant offered a deposition proving part payment of the account sued on, which was rejected improperly by the court below; upon writ of error to this court by the defendant, *held*, that the judgment below should be reversed; but upon the plaintiffs below entering a *remittitur* in this court of the amount proved by the deposition to have been paid, with interest up to the rendition of the verdict below, this court will render a judgment for the balance.

IN error from the circuit court of Pontotoc county; Nathaniel S. Price, judge.

Collin S. Tarpley, in September, 1842, sued Charles Anderson, in assumpsit, for the sum of $249 65, for attorney's fees, and money expended in the collection of claims due Anderson. Anderson plead non assumpsit and payment; the jury brought in a verdict for Tarpley of $275 86.

On the trial the plaintiff read the deposition of Richard C. Falkner; proved that he was clerk of the plaintiff during the time the account was contracted; that he had examined the ac-

Digitized by Google

count, believed it to be just and correct, and that it was still due by the defendant to the plaintiff; that he had charge of all the books, accounts and papers belonging to the plaintiff; that he always made the entries in the books, received and paid out nearly all his collections, and that he believed he recognized the amounts mentioned in the accounts, and remembered paying in person one of the heaviest items of the account; that the amounts paid out by the plaintiff were such as justly accrued against him in discharge of his charge of the business of the defendant, and as such needed no request to pay them, though he recollects well that Mr. Anderson requested the plaintiff to bring one of the suits, on which the execution was returned, no property found.

This being all the evidence of the plaintiff the defendant read to the jury the letter of the defendant Tarpley, dated "Clinton, Miss., 9th July, 1838," directed to Mr. Charles Anderson, and signed C. S. Tarpley for Taylor & Tarpley, firm, John M. Taylor, late of Huntsville, Ala., and C. S. Tarpley, late of Florence, Ala. In this letter Mr. Tarpley acknowledged the receipt of the claims inclosed to him for collection, and promised to give them prompt despatch. The claims inclosed being the same that the fees sued on had accrued for.

The defendant read another letter from Tarpley, September 26, 1838, in which he acknowledged the receipt of another note for collection, promised to obey the instructions of Anderson as to the currency, and stated that the Union Bank would go into operation on the next day, after which "no man could have any excuse for paying in anything of less value than the notes of that bank." The letter further states that Tarpley's terms for collecting in all cases were five per cent. and if he had to expend any money in making the negotiations he always charged it to the holder of the claim. This letter was signed, "your friend, C. S. Tarpley."

A third letter, signed Taylor & Tarpley, dated, Clinton, 24th November, 1838, acknowledging the reception of another claim for collection, was also read.

The defendant read another letter, dated 20th March, 1839,

Digitized by Google

stating the progress of the suits and condition of the various claims. This letter was signed "C. S. Tarpley, for R. C. Falkner." To this letter was the following postscript: "P. S. Taylor and Tarpley have dissolved."

A fifth letter, signed "C. S. Tarpley," dated 23d January, 1840, in which, after stating the progress of the claims, Tarpley adds of one of the debtors to Mr. Anderson, "he proposes to pay the amount in the notes of the Union Bank, due next spring; it is the best and almost exclusive currency of this country at present. From your particular instructions I cannot receive it, and nothing else can be collected. Now say, will you or will you not receive this money? I shall be governed by your answer, and only beg leave to add, you must take this or get nothing."

The defendant read a sixth letter, to himself, dated 26th March, 1840, signed, C. S. Tarpley, in these words, "under your instructions the money has been paid by Mr. Tupper, in the Union Bank. Inform me what disposition I shall make of the money and it shall be attended to."

The defendant read three other letters from Mr. Tarpley, which gave the history and progress of the suits in his hands, and also stated the value and condition of Union Bank money at the different periods of his writing, and advising Mr. Anderson to hold on to what he had received, as it would doubtless eventually be all collected.

The last letter from Tarpley was dated July 8th, 1841, and contained his account against Anderson, which was a duplicate of that sued on, and requested payment to be made immediately.

The defendant offered to read to the jury the deposition of J. M. Dyer, which proved the payment of fifty dollars to an agent of the plaintiff, on a note of Dyer's which the defendant had sent to the plaintiff for collection. This deposition was taken by consent; the plaintiff objected to its being read, and the objection was sustained and the deposition excluded. The record shows no reason for its exclusion.

John Colham, for defendant, testified that in March, 1840, Union Bank money was at a discount of twenty per cent.

Digitized by Google

On the part of the plaintiff, John H. Rollins proved that Tarpley had collected one of the debts from himself and partner, the one paid in Union money, and that the fee charged for its collection was the usual fee in such cases.

The plaintiff read also a letter from the defendant Anderson, expressly authorizing him to receive the notes of the Mississippi Union Bank in payment of the claims in his hands for collection.

On this proof the verdict was rendered, and the defendant below prosecutes this writ of error.

No counsel appeared for plaintiff in error.

George S. Yerger, for defendant in error.

We assume that, notwithstanding some of the bills and notes mentioned in the account were put in Taylor & Tarpley's hands for collection, yet that by the terms of the dissolution, Tarpley was entitled to fees and commissions subsequently brought, alone, and of this fact the plaintiff was informed, and assented to it, and that the jury were justified in finding the verdict they did from the evidence.

If this is not proved by direct or express testimony, it is satisfactorily proved by circumstances.

The bills or notes, or some of them, were put into Tarpley's hands before the dissolution, but the services were rendered afterwards by Tarpley, as the account proved by Falkner shows.

The defendant Anderson was notified that the partnership was dissolved, and after that time the letters and correspondence show that Tarpley alone was looked upon as the attorney of Anderson.

1. It is expressly proved by Falkner, who lived with Taylor & Tarpley, and with Tarpley, that the account is correct and is due to Tarpley.

2. Anderson read in evidence several of Tarpley's letters, which show and recite letters from Anderson to him individually, and recognizes him as his attorney.

Digitized by Google

On the 8th July, 1841, Tarpley writes to him and incloses his account, setting out the items, and requires a remittance.

The account is made out in his own name, is returned without objection to items or anything else, until September, 1842, one year and two or three months, when suit was brought.

Rollins also proves that the business done with him for Anderson, was by Tarpley alone.

In December, 1839, after the dissolution of partnership, Anderson writes to Tarpley, recognizing him as his attorney, &c., and wishing to know how he, Tarpley, is getting on with all his business. 2 Starkie's Ev. 20.

In regard to the deposition of Dyer, if it was erroneous to exclude it, the effect of receiving it would be only to reduce the verdict $50.

A *remittitur* may now be entered for that amount, if the court believe it was error to reject it. 4 Yerg. R. 565; 6 Ib. 333; 4 Maule & Selw. 94.

When a person to whom an account is sent, keeps it for any length of time without objection, it is an admission of its correctness as a stated account. Greenl. Ev. sec. 197, and notes.

So an attorney's bill rendered, and not objected to, is evidence for the consideration of the jury. Greenl. Ev. sec. 212; 1 B. & P. 49.

Mr. Justice CLAYTON delivered the opinion of the court.

Taylor & Tarpley were partners in the practice of the law, and during that time the plaintiff in error sent several claims to them for collection. On the dissolution of the partnership, these claims all passed into the hands of the defendant in error, who individually gave his attention to them, and rendered all the services in regard to them. The account was made out in his name individually, and the suit was brought in the same way. Taylor does not appear to claim any interest in the matter. The existence of the partnership, at the time the claims were sent for collection, is fully shown, as well as its dissolution before the services were rendered. A verdict was found for the plaintiff.

Digitized by Google

The plea was the general issue. Only one exception was taken during the trial, which was to the exclusion of a deposition. No charge was asked or given. A new trial was moved for, which was refused, and a bill of exceptions then also taken.

To question the character in which the party sued, a plea should have been filed under oath. H. & H. 595. If a firm should sue for an individual claim, that would clearly be the rule, and on principle it must be the same, when an individual sues for an alleged partnership claim. So if an executor sue in his individual capacity for a claim due to his testator.

The verdict is correct also in another point of view. The right of the plaintiff to compensation rested not upon the reception of the claims for collection, but in services rendered in effecting that object. If these services were rendered by Tarpley alone, if the claims remained in his hands after the dissolution, with the consent of Taylor, the jury might fairly infer from the testimony, that it was a part of the contract of dissolution, that Tarpley should attend to these claims, and receive the compensation for so doing.

An exception was taken during the trial to the exclusion of the deposition of J. M. Dyer; there have been no objections pointed out to it, and upon examination we do not discover any. For this reason the judgment must be reversed. The payment established by the deposition rejected is fifty dollars on the 20th December, 1839. The defendant in error now offers to remit here that sum with the interest. Upon his doing so, this court will render a judgment for the balance, that being the amount for which the judgment below should have been rendered. The interest upon the amount paid to be computed till the rendition of the verdict in the court below. H. & H. 618.

Judgment reversed.

Digitized by Google

John B. Nevitt *vs.* The Bank of Port Gibson.

The provisions of the act of the legislature of 1843, (Session Acts, page 55,) entitled an act, "prescribing the mode of proceeding against incorporated banks, for a violation of their franchises;" which provide that when a judgment of forfeiture is entered against a bank in proceedings under that act, its debtors shall not merely be released from their debts and liabilities, but that the court rendering such judgments, shall appoint one or more trustees, "to take charge of the books and assets of the bank, to sue for and collect all debts due to it, to sell all its property, and apply the same as might be thereafter directed by law to the payment of its debts," do not impair the obligation of the contracts of the debtors of the bank, and are in all respects constitutional.

All legislation which materially affects the laws for the enforcement of a contract, existing at the time it is made, impairs the obligation of the contract.

The right of the legislature to remit a penalty or forfeiture imposed by law exists; and may be enforced without impairing the obligation of any contract to which the penalty or forfeiture may be attached.

Where the bank has forfeited its charter, it is a legitimate and proper exercise of legislative power to provide by law for the preservation of the property of the bank for the benefit of its creditors, by remitting the penalties which attach to a judicial judgment of forfeiture of its charter.

The sixth section of the act of 1843 prescribing the mode of procedure against banks which have forfeited their charters, which authorizes the issuance of an injunction against the bank to restrain it from the collection of its debts, is constitutional, only when taken in connection and regarded as part of the same law, with the ninth, tenth and eleventh sections of the act, and which provide for the collection and preservation of the debts and assets of the bank for the benefit of creditors.

Where a judgment of forfeiture has been rendered against a bank in proceedings under the act of 1843, and trustees have been appointed by the court rendering the judgment, all suits pending in the name of the bank, whether at law or in equity, may be revived at the instance and in the name of the trustees; and the action will progress in the name of such trustees, in the same manner and to the same effect that a suit is revived in the name of an executor or administrator, which was pending in the lifetime of the testator or intestate.

Digitized by Google

Nevitt v. Bank of Port Gibson.

The act of 1843, in its ninth, tenth and eleventh sections, directing the trustees to proceed to collect the debts and property of the bank for the benefit of creditors, to be applied as thereafter directed by law, constitues the property of the bank, a trust fund for the benefit of creditors which no subsequent legislation can appropriate otherwise; and if the legislature fail to direct the mode of distribution among the creditors, a court of chancery will execute the trust.

A judgment of forfeiture against a bank, and appointment of trustees under the act of 1843, is an assignment by operation of law of all the property of the bank to the trustees for the benefit of creditors; which relates back to the period of the issuance of the injunction against the bank under the act, and preserves the assets and property of the bank from that time, for the benefit of the creditors.

A judgment of forfeiture against a bank under the act of 1843, has none of the common law consequences of judgment of forfeiture; the legislature having waived its right to the common law penalties by providing that concurrently with the judgment of forfeiture, the assets and property of the bank shall vest in trustees for the benefit of creditors of the bank.

The mere judgment of forfeiture does not *ipso facto* work a dissolution of the corporation; there must be first execution for the seizure of the franchises before the penalties of forfeiture take place.

Mr. Justice Thacher dissenting from the foregoing conclusions; and deciding that the ninth, tenth and eleventh sections of the act of 1843, were unconstitutional, as impairing the rights of the debtors of the banks; whose debts had become extinguished by the judgment of forfeiture; and that all the trustees could legally take into possession were the goods and chattels of the bank, in which by the judgment of forfeiture the state had a vested interest.

On appeal from the superior court of chancery of the state of Mississippi.

The Bank of Port Gibson having, on the 15th day of May, A. D. 1841, obtained judgment at law against John B. Nevitt, he, on the 1st day of May, A. D. 1844, filed his bill in the superior court of chancery, to enjoin it. The injunction having been granted on the bill was, on final hearing, dissolved by the chancellor; and Nevitt appealed to the high court of errors and appeals. While this appeal was pending proceedings were commenced in the circuit court of Claiborne county against the bank, at the instance of the state, under the act of 1843, entitled "an act to prescribe the mode of proceeding against

Digitized by Google

incorporated banks, for a violation of their corporate franchises, and against persons pretending to exercise corporate privileges under acts of incorporation, and for other purposes;" on which proceedings the following judgment was, on the 14th day of June, 1845, rendered, viz.: "It is considered by the court that the said defendant, the Bank of Port Gibson, be, and it is hereby ousted of all the liberties, franchises, and privileges, granted or conferred, in and by the act of the legislature, set forth in the plea of said defendant, (the act of incorporation of the bank,) and it is further considered by the court that said liberties, privileges, and franchises, so forfeited, as aforesaid, be seized into the hands of the state of Mississippi."

"The court, in pursuance of the directions contained in the 8th section of the act of 1843, chapter 3, hereby appoints James J. Person and James T. Marye, trustees of the Bank of Port Gibson, against which bank judgment of forfeiture of its charter has this day been rendered; the said James J. Person and James T. Marye are hereby directed to execute a bond, with such securities as may be approved of by the court, in the penalty of twenty thousand dollars, payable to his excellency Albert G. Brown, governor of the state of Mississippi, and his successors in office, conditioned as the law directs, and the said James J. Person and James T. Marye, having executed said bond, with James H. Maury, Jesse O. Rundell, Moses Clark, and Lemuel N. Baldwin, as securities therein, who also executed the same, the same bond is hereby received and approved by the court. The said Bank of Port Gibson, the officers, agents, &c., are hereby ordered to deliver to the said James J. Person and James T. Marye, all the property, notes, bonds, and choses in action of said bank; and the injunction in this case is hereby ordered to be dissolved."

On the 5th day of December, 1845, Person and Marye, the trustees, made a motion in the high court of errors and appeals, that in the appeal therein pending, in the case of Nevitt against The Bank of Port Gibson, the suit might be revived in their names, as the representatives of the bank. On that motion the case was argued and submitted.

Digitized by Google

Charles Scott, for the motion to revive, cited the following authorities: Ang. & Ames on Corp. 129, 476, 664, 667, 668; 2 Kent's Com. 307; Act of 1843, 55; 1 Paige's Ch. R. 110; 18 Pick. R. 66; 3 Burr. R. 1866; 3 Lev. 287; 3 T. R. 241, 242–246; 2 Mason's C. C. R. 43; 3 Ibid. 308; 16 Mass. R. 9–15; 16 Pick. 38; 15 Mass. R. 505, 517, 522; 8 Pet. R. 281; 2 Sto. Eq. § 1252, 623; *Blakely et al.* v. *Farmers and Mechanics Bank*, 17 Serg. & Rawle, 356; 5 Ibid. 256; 4 Ibid. 356.

H. T. Ellett, for Nevitt, cited the following authorities: 1 Jac. Law Dict. title Abatement, 9; 2 Tidd's Pr. 965, 1166, 1167, 1168, 1169, 1219, *et seq.*; 2 Saund. R. 72, R.; Ibid. 72, m; 1 Wilson, 315; H. & H. 584, 585, § 29, 30, 31, 33; 1 Ld. Raym. 245; 1 Salk. 319; Act of 1843, 55, § 8; 4 S. & M. 17; 4 Yerg. 202; 5 Ibid. 320; *Kenner* v. *Tannant*, 15 East, 622; 4 Mass. R. 411; 1 Bl. Com. 484; 2 Kent's Com. 306, 307; Ang. & Ames, 513; 2 Jac. Law Dict. 101; 3 Burr. 1866; Bac. Ab. Corporation, 9; 2 Kyd on Corp. 516; 1 Co. Litt. B. 1, chap. 13, 136, (195, 196) note O; 1 Blackf. 267; 1 S. & M. Ch. R. 267; 1 Paige, 111; 8 Peters, 281; 2 Harrington's R. 8; 18 Pick. 66; *Fox* v. *Horab*, 1 Iredell's Eq. R. 358; 3 Term R. 244; 4 Cowen, 101, note and cases cited; 2 How. (S. C.) R. 608; 1 Ibid. 311; *Ogden* v. *Saunders*, 12 Wheat. 256; Ibid. 327; *Green* v. *Biddle*, 8 Wheat. 1–84; *Sturgis* v. *Crowningshield*, 4 Ibid. 197; *Colchester* v. *Scaber*, 3 Burr. 1866; *Rex* v. *Amory*, 2 Term R. 615; *Rex* v. *Passmore*, 8 Ibid. 241; 2 Kyd, 516; *Bank of Mississippi* v. *Wren*, 3 S. & M. 791; 2 Saund. 72, k; 15 East, 622; 4 S. & M. 572.

Van Winkle and *Potter*, on same side, cited *Grout* v. *Chamberlin*, 4 Mass. 611, and cases cited; S. C. Ibid. 613; *Beaumont* v. *Long*, Cro. Car. 208, 227; Anon. Ibid. 464; *Yare* v. *Gough*, Cro. Jac. 3; *Alsop* v. *Mather*, 8 Conn. 586, and cases cited; 2 Tidd's Pr. 1116; *Wilson* v. *McElroy*, 2 S. & M. 250; 1 Blackf. 284; *Commercial Bank* v. *Lockwood*, 2 Harring. 9; Dwarris on Stat. 707, *et seq.*; *Planters Bank* v. *Sharp*, 4 S. & M. 17; *Jef-*

Digitized by Google

frey v. *McTaggart*, 6 M. & Sel. 126; *Doe* v. *Cheever*, 1 Blackf. 336; 1 Bac. Ab. title Bankrupt, 571, 608; 1 Story's Laws of U. S. 737; Acts of Con. 1841, § 3; Act 32 Hen. VIII. c. 34; 1 Saund. R. 239; H. & H. 412, § 88; Ibid. 371, 373; Ibid. 365, § 9; Const. Art. 1, § 14; *Offier* v. *Bell*, 5 Yerg. 520; *Tate* v. *Bell*, 4 Ibid. 202; *Hampshire* v. *Franklin*, 16 Mass. 83; *King* v. *Dedham Bank*, 15 Ibid. 454; *Fox* v. *Horah*, 1 Iredell's Eq. R. 360; 2 Harr. 9; *State Bank* v. *Cooper*, 2 Yerg. 599; *Wally's Heirs* v. *Kennedy*, Ibid. 554; Eng. Stat. 31 Edw. III. ch. 2; 9 Co. R. 38, *et seq.*; 1 Lomax Ex'r. 131; *Mumma* v. *Potomac Co.* 8 Pet. 287; Co. Lit. 13, b; *Woodward* v. *Ld. Dorcy*, 1 Plowd. R. 184; Ibid. 278; 2 How. U. S. R. 613; 1 Paige, 107; 13 Mass. 16; 16 Johns. 233; *Foster* v. *Essex Bank*, 16 Mass.; 1 Cov. & Hughes's Index, title Corporation.

George S. Yerger, for the motion to revive.

The following opinion of chancellor Kent was read by Mr. Yerger in the course of his argument, and is the one referred to by Mr. Justice Thacher, in his opinion:

"I have considered the statement of facts in the case accompanying this opinion, and have likewise examined the documents referred to in that statement, consisting of the bill to establish the Commercial Bank of Natchez, and also of a copy of an act of the legislature of Mississippi, passed the 26th of July, 1843, and entitled 'An act to prescribe the mode of proceeding against incorporated banks for a violation of their corporate franchises, and against persons pretending to exercise corporate privileges under acts of incorporation, and for other purposes.'

The following questions are submitted to me as counsel, for my opinion:

1st. Whether, upon a fair construction of the provisions of the law of 1843, the trustee appointed under it has the power to sue, in his own name or otherwise, the debtors of the late corporation, collect and dispose of the assets, settle with the creditors, and distribute the surplus among the stockholders?

2d. Whether, if the legislature should repeal the 8th, 9th and

Digitized by Google

10th sections of the law of July, 1843, the repeal would legally put an end to the existence, powers and duties of the trustees appointed by the courts upon judgment of ouster before the repeal of these sections?

3d. Whether, if the legislature were to repeal these sections, (leaving the assets of the bank at the time of judicial forfeiture, it is said, as at common law,) a court of equity would interfere on behalf of creditors and stockholders, or of creditors of the bank, and subject the real and personal estate left by the bank as a trust fund to the payment of the creditors and stockholders, or at all events the creditors, and also hold the debtors of the late bank liable for the payment of their debts for the like purpose?

1st. In answer to the first question, I am of opinion, that, upon a fair construction of the provisions of the act of 1843, the trustee appointed under it has the power to sue, in his own name or otherwise, as trustee, the debtors of the corporation for which he is appointed, and collect the debts due to the bank, and sell and dispose of all the property of the bank, and apply the proceeds of the debts and other assets to the payment of the debts of the bank, and distribute the surplus among the stockholders. Those powers are clearly granted by the act, and appear to me to leave no room for doubt or difficulty. The provision in the act for the appointment of a trustee in the given case, would necessarily imply such a power, without the express grant of it.

2d. In answer to the second question, I am of opinion, that a legislative repeal hereafter of the 8th, 9th and 10th sections of the above-mentioned act of 1843, could not legally, or upon sound constitutional or just principles, destroy or put an end to the powers and duties of the trustees appointed prior to such repeal in pursuance of a judgment of ouster. The trust arose upon the appointment of the trustee on the judgment of ouster, and was thereby fixed and attached as a valid power, and became a vested interest and right in the *cestui que trust*, not revocable without the consent and act of the parties in interest in the trust, any more than other vested rights of property. It is,

Digitized by Google

I apprehend, a principle too well settled and wisely established to admit of discussion at this day, that a statute cannot have a retroactive or retrospective operation, so as thereby to impair or injuriously disturb vested rights. The language of the constitutions, laws, and judicial decisions in this country, and which constitute the noble and elevated jurisprudence of the American people, unitedly consider retrospective statutes going to impair private rights, otherwise valid under the laws which created them, to be flagrantly unjust, and consequently void.

It is not to be presumed that any legislative body would pass such a law intentionally; and if they should do so under misapprehension or mistake, it is to be presumed that the courts of law and equity having cognizance of the case, would consider themselves bound, by the fundamental principles of the government, on which the rights of persons and property rest, not to give it effect.

3d. In answer to the third question, I am of opinion, that if the three sections of the act were to be repealed, without any provision for the payment of debts and collection of debts and property belonging to the bank, that the property and debts due to and belonging to the bank would remain a trust fund, subject to the cognizance and control of a court of equity for the benefit of creditors. The idea is not to be indulged or conceded, that the jurisprudence of the state of Mississippi, or that throughout the United States, is so lame and defective, as not to take due and efficient care of the appropriation of the assets of the bank to the just demands of creditors, and eventually of stockholders.

It would be a deplorable failure of duty, if such a protection was denied. By the legislative creation of a bank with its capital and organization, a fraud upon the public could not have been intended. The just intention of the charter must undoubtedly have been, that the capital authorized to be invested should constitute a trust fund for the benefit of depositors and bill-holders, who by the institution are considered to be invited and induced to place confidence in the bank and its powers and capital as requisite means for their security and indemnity.

Digitized by Google

To permit the odious and obsolete doctrine of ancient date, before moneyed institutions were introduced, to be now applied on the dissolution of the bank, perhaps by its own mismanagement and abuse, so that all its assets were to be considered as dispersed to the wind, without any owner or power anywhere to collect and justly apply, would be a disgrace to any civilized state. But this cannot be supposed to take place; the improved and enlightened administration of equity jurisprudence in every part of our country have taught and established sounder and juster doctrines, and this is apparent in the legislative acts and in the decrees of the court of equity relative to insolvent and dissolved moneyed charters. The provisions in the 8th, 9th and 10th sections of the Mississippi act of July, 1843, is a striking instance of the prevalence and recognition of this spirit of justice. There is not an instance in the English law, in which the funds of an insolvent or forfeited moneyed institution have been permitted to be abandoned, and creditors denied redress and payment out of them.

The capital stock of a bank, said Mr. Justice Story, in *Wood* v. *Dummer*, 3 Mason R. 309, was a pledge or trust fund for the payment of debts contracted by the bank, and this was a principle, as he observed, plain in law, as well as in common sense, and creditors might follow that trust fund in the hands of any person having notice of the trust attached to it. We have also the controlling authority of the supreme court of the United States on the same subject, in the case of *Mumma* v. *The Potomac Company*, 8 Pet. R. 281, and the opinion of the court was clear and decisive upon the established principle. In that case the charter of the Potomac Company was declared by the legislature of Virginia to be vacated and annihilated; it was considered to be a dead corporation; but the court says, that the death of a corporation no more impairs the obligation of its contracts, than the death of a private person. The obligation survives, and the creditors may enforce their claims against the property of the corporation, inasmuch as the property still remains in trust for creditors and stockholders. The same doctrine has been mentioned and recognized by the learned chan-

Digitized by Google

cellor of Mississippi, in the case of *Wright* v. *Petrie*, 1 S. & M. Ch. R. 319, where it is said that the directors were trustees of the corporate funds, and bound to administer them in good faith, when the company is insolvent, for the benefit of creditors and stockholders, and that they might pursue corporate funds and debts fraudulently assigned. And while on this subject, I hope it may not be deemed improper to add this consolatory remark, that the decisions of the courts of law and equity in Mississippi, as contained in the reports of Messrs. Smedes and Marshall, afford the evidence of an upright, firm and enlightened administration of justice, both in law and equity, that reflects honor on the character of the state.

(Signed) JAMES KENT.

New York, October 12, 1845.

Mr. Justice CLAYTON delivered the opinion of the court.

The great question in this cause is, whether the 8th, 9th and 10th sections, of the act of 1843, "prescribing the mode of proceeding against incorporated banks, for a violation of their corporate franchises," are constitutional or not. These sections, in substance, provide that, when a judgment of forfeiture is entered against a bank, its debtors shall not be thereby released from their debts and liabilities, but that the court rendering such judgment shall appoint one or more trustees to take charge of the books and assets of the same, to sue for and collect all debts due to it, to sell all its property, and apply the same as might be thereafter directed by law to the payments of its debts.

The objection to the validity of this law is, that it impairs the obligation of the contract, between such bank and its debtor. It is insisted that at the time of the contract, it was a part of the law of the land, that if the bank so acted that its charter should be taken from it, the consequence was that the debtor was released from his liability; that this law entered into and formed a part of the contract, and that the change made by this statute impairs the obligation of that portion of the contract, and thus violates the constitution.

Digitized by Google

It is moreover insisted that all the laws in force, when a contract is made, are incorporated with and form parts of it, and cannot be changed without violating this constitutional prohibition. In other words, legislation must not only be prospective, but it must be construed to operate only on contracts entered into after its passage. The cases of *Bronson* v. *Kinzie et al.* 1 How. S. C. R. and *McCracken* v. *Hayward*, 2 How. 608, are relied on as establishing these principles. The first of these was a case under the valuation laws of the state of Illinois, and it was a mortgage, the date of which was antecedent to the passage of the law. The extent of the right of the legislature to charge the remedy existing at the time of the contract, was the point before the court, and all their expressions must be construed with reference to that point. The opinion says, "it is difficult perhaps to draw a line that would be applicable to all cases between legitimate alterations of the remedy, and provisions which in the form of remedy impair the right." "There is no difference between a retrospective law, declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it. No one doubts the rights or the remedy of the mortgagee, for by the laws of the state then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the parties. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law impairing the rights thus acquired, impairs the obligation which the contract imposed."

The case of *McCracken* v. *Hayward* arose under the same law of Illinois. In this case the court says, "The obligation of the contract consists in its binding force upon the party who makes it. This depends upon the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract,

Digitized by Google

in favor of one party to the injury of the other. It is not to be understood that all state legislation on existing contracts is repugnant to the constitution. It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to the younger, if the prior deed is not recorded within the limited time, and the power is the same, whether the deed is dated before or after the passage of the recording act. Such too is the power to pass acts of limitation and their effect." "The obligation of the contract between the parties in this case was to perform the contracts and undertakings therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws." 2 How. 613.

These decisions certainly establish the principle that all legislation which materially affects the laws for the enforcement of a contract existing at the time it is made, impairs the obligation of the contract. This is the effect, although no reference be made to such laws by the contract, as fully as if they were written out at the time and incorporated into it. To this extent the influence of these decisions meets with unqualified acknowledgment. But these cases do not show, nor is there any reason to believe, when they are compared with the prior decisions of the same court, that it was meant to prohibit all legislation in regard to existing contracts, as beyond the pale of legislative power. The court itself says that it is not to be understood that all legislation in regard to existing contracts is repugnant to the constitution. Indeed, such a construction would make our frame of government an impotent and impracticable scheme. The effect of the law must be looked to in every instance, and if it diminish the binding force of the contract on the party who makes it, then it is obnoxious to the constitution, otherwise not. The statute book of every state is filled with provisions which bore upon contracts in existence at the time of their passage; to strike all these out, would leave the statutes themselves in a hopeless state of mutilation and confusion.

Digitized by Google

There is a subsequent case which came before the same exalted tribunal, which explains to some extent their own sense of the two cases just referred to. I mean *The State of Maryland* v. *Baltimore and Ohio Railroad Co.* 3 How. 534. In that case, by an amendment of the charter of the company in 1836, it was enacted "that the state should subscribe for three millions of the stock of the company, with a proviso that if the company should not locate its road so as to pass through Washington county, they should forfeit one million of dollars to the state of Maryland, for the use of said county." In 1841, another act was passed, repealing so much of the former act as directed the route of the road through Washington county, and releasing the forfeiture imposed by the former act, by way of penalty for non-compliance. The constitutionality of the latter act was the turning point of the case. The court says, "a provision that the party shall forfeit a particular sum, in case he does not perform an act required by law, has always, in the construction of statutes, been regarded not as a contract with the delinquent party, but as the punishment for an offence. Undoubtedly, in the case of individuals, the word *forfeit* is construed to be the language of contract, because contract is the only mode in which one person can become liable to pay a penalty to another for a breach of duty, or the failure to perform an obligation. In legislative proceedings, however, the construction is otherwise, and a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined upon a party by law; and such, very clearly, is the meaning of the word in the act in question." 552. The right to remit a penalty or forfeiture is fully recognized, and the decision was in favor of the validity of the law.

The principle of this case fully comprehends the one before this court. By a breach of the conditions of the charter, the bank forfeited its franchises. This forfeiture the legislature had the right to remit in whole or in part. Angel & Ames on Corp. 664. It interferes with no part of the contract between the bank and its debtors, and they have no right to complain.

But the principle, which the counsel for the appellant so

Digitized by Google

strenuously invokes, would not aid them. Say that, at the request of the debtor, it was written in the contract after the promise to pay the money, — provided the bank does not forfeit its charter; be it so, the bank may reply, but write farther, — provided also the state does not release or remit the consequences of such forfeiture. If all this were done, the case would but stand as it now does, when the legislature has exercised a lawful and constitutional power.

The history of legislation in the states of this Union affords but too many instances of the fatal facility of chartering banks, and too many evidences of the ill effects of such policy. At some period or other of their existence, a great proportion of the states has run the same round which ours has done. Numerous banking companies have been incorporated — excessive issues of their paper have been made — inflation — depreciation and insolvency have followed; and then comes legislation to compel them to wind up, to seize on their charters, and to save a few planks from the wreck. The same general features are exhibited in their course — a course too often "begun in folly, closed in tears." An eloquent advocate describes it as a sort of national madness, insists that no one should be punished for it, and declares that he knows not how to frame a bill of indictment against a whole people. The cool and sagacious sons of New England, the impetuous and impulsive children of the South, and the hardy and adventurous men of the West, have all performed the same circuit. Yet whenever this point has been made, and it has been heretofore made, it has invariably been decided, that the effort to save the wreck for the creditors was constitutional. In many of the states it has been acted upon and enforced by the courts, as an unquestionable exercise of legitimate power.

The cases cited by the counsel for the appellant, in support of his position, that these provisions are unconstitutional, do not sustain him. The case in 2 Harrington, 14, arose under a statute which was not passed until two years after the dissolution of the corporation. It assumed to revive the corporation, after it had expired by its own limitation, "with the same

Digitized by Google

powers, privileges and immunities, that had been granted to it by its original charter." The decision was, that these words were not intended by the legislature to revive the debts which had been extinguished two years before, and that it was unnecessary to decide what would have been the effect, if the debts due to the corporation had been in express terms revived. Neither is it necessary for us to decide such point.

The case of *The State Bank* v. *The State*, 1 Blackford's Ind. Reports, is liable to the same remarks. The court decides that the act under which the proceeding took place, was not intended to change the common law rule in regard to the consequences of a forfeiture. The debts due to the bank were considered upon common law principles unaffected by the act, and therefore subject to extinguishment by a dissolution of the corporation.

The same is true in regard to the North Carolina decision. It was holden that the facts did not bring the case within the statute of that state, providing that upon a judgment of forfeiture or dissolution against a corporation, the consequence shall not be to extinguish the debts due to or from it, but that a receiver should be appointed to collect and pay them over. The court decided the act did not embrace a corporation whose existence was terminated by the expiration of its charter from lapse of time, and therefore applied the common law principle. There seemed to be no doubt, by the court or the counsel, that if the case had come within the act, the debt would not have been extinguished. *Fox* v. *Horah*, 1 Ired. Eq. Cas. 362. Thus none of these cases are like the present.

In Ohio, a similar law has been acted on as constitutional. 13 Ohio Reports, 270. In New York, the provision has been held constitutional. *Bank of Columbia* v. *Attorney General*, 3 Wend. 600. By the Maryland act of 1818, the 5th section authorizes, upon a given state of facts, a judgment of forfeiture. The sixth section directs that the court giving the judgment of forfeiture, shall appoint commissioners to settle and close the concerns of the bank. This act has not only been recognized as constitutional by the supreme court of that state, but they

Digitized by Google

say in one of their decisions, it had been decided to be constitutional by the supreme court of the United States. *Bank of Maryland* v. *Ruff*, 7 Gill & Johns. 465.

Let us now turn to cases which have been decided in our own court. The first we will notice is *The Bank of Mississippi* v. *James Wrenn*, 3 S. & M. 791. The original charter was by its terms, to have expired on the last day of December, 1834. Three several acts were passed, giving further time for it to collect its debts until January, 1844. One of its suits depended in this court for many years. Its right to prolonged existence for this qualified purpose, was never questioned in this court; and the suit finally abated by the expiration of the last act on the subject in 1844. This case proves nothing, except that neither the court nor the counsel, seem ever to have supposed that these enabling acts were unconstitutional.

The next is the case of *Payne et al* v. *Baldwin*, *Vail* v. *Hufty*, 3 S. & M. 671. That case involved the constitutionality of the act passed in 1840, which forbids the transfer by any bank, of any bond, bill, note or other evidence of debt. After most elaborate argument, the law was sustained, although it certainly took away from the bank one of the incidental powers which it had enjoyed and exercised, that of negotiating its paper.

Next is the case of *The Commercial Bank of Rodney* v. *The State of Mississippi*, 4 S. & M. 440. That case involved the constitutionality of the 6th section of the same statute now under consideration. That clause injoins and restrains the banks, their agents and assignees, from proceeding in the collection of any debts due to them, from the time the information in the nature of a *quo warranto* is filed, until its determination. This clause attracted the largest share of the court's attention, yet the whole act, and the whole series of acts on the subject, passed under review to some extent. The court was unanimous in the opinion that this section did not impair the obligation of the contract of the state with the bank, in the sense of the constitution. Upon this point there was no decision, though in other particulars there was.

Digitized by Google

All the acts upon this subject must be viewed in connection, and regarded as one. The statute of 1840 forbade all assignments of their negotiable securities by the banks, at the same time that it declared a suspension of specie payments a forfeiture of charter. Not more than one or two banks in the state were then in a condition to avoid falling under this provision. But for this provision they might have made a general assignment or transfer of their assets to trustees, to collect for the creditors and stockholders, and such assignment would have been valid. Other acts followed on the same subject, when at last came this now under consideration. The act of 1840 forbade all transfers; the act of 1843 forbade all collections by the banks, during the pendency of any proceeding by *quo warranto;* and if the sections now under consideration are declared unconstitutional, the judgment of forfeiture will not only operate to extinguish all debts now due to such institutions, but nearly all which were due in 1840, as we know that from the operation of the valuation law the process of collection was very slow from 1840 to 1843. In view of all these enactments I am authorized, by a majority of the court to say, that the sixth section of the act of 1843 could never have obtained their sanction, except in connection with the remaining sections, because apart from them its manifest and direct effect would be an extinguishment not only of all debts due at the time of the judgment of forfeiture, but of all due at the date of filing the information. This retroactive effect of the judgment could not but impair the obligation of the charter. The sixth, eighth, ninth and tenth sections are therefore in our view inseparably connected; they are parts of one whole, and the sixth having been sustained, the others must be likewise. It was sustained because its avowed and ostensible object was to preserve the assets of the banks pending litigation, and until the court could, under the remaining sections, have them collected and applied to the creditors.

The remaining points will be disposed of more briefly. It is objected that the law is imperfect, and cannot be carried into effect, because it does not say in what name suits for the collec-

Digitized by Google

tion of debts due the banks shall be brought. The words of the act are "that upon judgment of forfeiture against any bank the debtors of such bank shall not be released by such judgment from their debts and liabilities to the same; but it shall be the duty of the court rendering such judgment to appoint one or more trustees to take charge of the books and assets of the same; to sue for and collect all debts due such bank, and to sell and dispose of all property owned by such bank, and the proceeds of the debts when collected, and of the property when sold, to apply as may hereafter be directed by law to the payment of the debts of such bank." Acts of 1843, p. 55.

By the judgment of forfeiture, or by the execution of the judgment according to some of the authorities, the corporate franchises of the bank are at an end. If suit is to be brought, it cannot be presumed to have been the intention of the legislature that it should be in the name of a defunct corporation, and of necessity it must be in the name of the trustees. The law in regard to the estates of decedents does not direct that the suits brought by executors or administrators shall be in their own name; yet no one can doubt that this is the proper mode. The analogy between the two statutes is perfect. They supply the succession or representation, give a right of suit, and as an incident to such right the power and authority to sue must be in the name of the trustees. No doubt the legislature might have continued the corporate franchises, so far as to authorize suits to be brought in the name of the bank, to wind up its concerns. This mode has been adopted in several of the states. But this would require a plain and manifest intent, and without it we can see no objection to the suit in the name of the trustees. 13 Ohio R. 270.

A short time before the expiration of its charter, the first bank of the United States, by deed of general assignment assigned all its property, debts, securities, &c. to assignees in trust for the liquidation of its affairs. The assignees filed a bill for the recovery of the amount of certain notes due to the bank. Chief Justice Marshall, in delivering the opinion of the court, said: "The court will not give any opinion whether any action can

Digitized by Google

be maintained at law upon any of the promissory notes in the record, by an assignee who does not claim the same by an indorsement upon the notes. For in this case there is no specific assignment of these notes; the only assignment is a general assignment in trust, of all the property of the late bank of the United States, and as the act of incorporation had expired, no action could be maintained at law by the bank itself. Under these circumstances the court is clearly of opinion that a suit may be maintained in equity against the other parties to the notes." *Lenox* v. *Roberts*, 3 Wheaton, 376. The transfer of the effects of the banks by the clause now under consideration, is more comprehensive than the deed of assignment under which that decision was made. It directs the performance of acts by the trustees which can only be accomplished by a transfer to them of the legal ownership of the property. If it goes that length they can of course maintain an action at law. The late bankrupt act does not in terms vest the right of action in the assignee in his own name. But it divests by the decree of bankruptcy the property out of the bankrupt, and vests it in the assignee, and no legal mind doubts that the latter is clothed with the right of action at law. But this is a suit in equity, and we need not go farther than the case just cited.

It is next objected that the suit cannot be revived in the name of the trustees, either upon motion or by *scire facias*. By the statute law of this state, the court of chancery and this court each is clothed with the power of making rules for the conduct of suits depending in them. In the exercise of this power the chancery court has directed "that when any party shall die, the proper representative of the personalty or realty, as the case may be, may voluntarily come in and be admitted a party to the suit." This court has adopted the rules of the chancery court for its guidance and government in chancery proceedings. We think the present case is comprehended by the rule. *United States Bank* v. *Merchants Bank*, 1 Rob. Va. R. 589; *Beaston* v. *Farmers Bank of Delaware*, 12 Peters 134; *Louisville Railroad Co.* v. *Litson*, 2 How. S. C. R. 558. In a case like this in all its essential features, the court of appeals in Virginia permitted the

Digitized by Google

case to proceed, after the expiration of the charter, without noticing the dissolution upon the record. In that case the bank had made an assignment before the dissolution. *Bank of Alexandria* v. *Patten*, 1 Rob. Va. R. 525.

The last objection we shall notice is, that the statute is insufficient and incomplete in this, that it directs that the assets shall be applied as may be hereafter directed by law to the payment of the debts of the bank, and as there has been no direction subsequently given, the law is too imperfect to be enforced.

We cannot yield to this construction. The act in effect declares the assets of the bank to be a trust fund for the payment of debts, and makes it the duty of the trustees to collect them. This is a trust which would be enforced in a court of equity, without any further legislation. Indeed if the legislature were to attempt to apply the assets to any other purpose than the payment of the debts of the corporation, it would transcend its constitutional limits. That body might have permitted the debts to be extinguished by the dissolution, but having rescued them from this fate and declared them a trust fund, it could not divert it to any other object. But no attempt of that kind has been made. It might have been intended to pass some law regulating the mode in which payment was to be coerced from the trustees, but upon their failure to apply any other remedy, the courts of the country would apply the existing remedies, which are abundantly sufficient for the purpose.

The motion will be sustained, and the cause stand revived.

Mr. Chief Justice SHARKEY concurred in the foregoing opinion.

Mr. Justice THACHER delivered the following dissenting opinion.

On the 1st day of May, 1844, John B. Nevitt filed his bill in chancery to enjoin the collection of a judgment at law, obtained by the Bank of Port Gibson against him. On the final hearing of the bill in chancery, the injunction, previously granted, was dissolved. From the decree of the chancellor, dissolving this injunction, an appeal was taken by Nevitt to this

Digitized by Google

court. Pending this appeal, a judgment of ouster and forfeiture was rendered in the circuit court of Claiborne county, against the Bank of Port Gibson, and James J. Person and James T. Marye were appointed trustees to collect the assets of the Bank of Port Gibson, in pursuance of the statute of 1843, authorizing proceedings against banks for the forfeiture of their charters. These trustees have entered their motion in this court, praying to be made parties defendant to the appeal of the said Nevitt, and for leave to defend the same.

The majority of the court have determined to grant the motion, but my views of the law compel me to dissent from their opinion.

Several points have been made in the argument of this cause, but I shall direct my inquiries to the comprehensive question, whether or not the rights and credits of a bank survive the judgment of forfeiture, authorized by the statute of 1843.

The power of the legislature to oust corporators of their franchises, and to continue the use of the franchises in other corporators, is not disputed by me. The principle was recognized in my opinion in the case of *The Commercial Bank of Rodney* v. *The State*, 4 S. & M. 483. But, from the best examination I have been able to bestow on the statute of 1843, and the rules of law applicable to it, I am forced to the conclusion that the rights and credits of the Bank of Port Gibson do not survive the judgment rendered against that bank. This question was not presented, nor was it considered by the court in the case of the Commercial Bank of Rodney.

The judgment against the Bank of Port Gibson is in the following words: "That the said bank be, and is hereby ousted of all the liberties, franchises, and privileges, granted or conferred in, and by the act of the legislature," chartering the same; and that said liberties, privileges, and franchises, so forfeited, be seized into the hands of the state of Mississippi Subsequently to the rendition of this judgment, an order was made by the circuit court that James J. Person and James T. Marye, be appointed trustees of said bank, who are directed to execute bond, with approved security, in the penalty of twenty

Digitized by Google

thousand dollars, payable to the governor of the state, and his successors in office, conditioned as the statute directs.

The statute upon which the foregoing judgment and order are founded, provides that, upon judgment of forfeiture against any bank, its debtors shall not be released by such judgment from their debts and liabilities to the bank, but that it shall be the duty of the court rendering such judgment, to appoint one or more trustees, to take charge of the books and assets of the same, to sue for and collect all debts due such bank; to sell and dispose of all property owned by such bank, or held by others for its use, and the proceeds to apply, as may hereafter be directed by law, to the payment of the debts of such bank; that the trustees shall give bond, with good and sufficient security to faithfully collect the assets of the bank, to sell and dispose of the property belonging to the same, and the proceeds, when collected, to pay over as may hereafter be directed by law.

The judgment and order of the court strictly follow the provisions of the statute. The judgment is not only an ouster of the corporators, but a total seizure of all the liberties, privileges, and franchises of the bank, into the hands of the state. The corporation is dissolved, and utterly extinct. The state has neither continued the franchises of the bank for the purpose of collecting its assets, nor has it conferred them upon a new corporation. The question now arises, what are the consequences of such a judgment? According to the unbroken current of authorities, both in England and the United States, upon the dissolution of a corporation, its real estate reverts to the granior and his heirs; its personal estate vests in the people in this country, and, in England, in the crown; and the debts due to and from the corporation, are totally extinguished, so that neither the stockholders, nor the directors, nor trustees of the corporation, can recover or be charged with them, in their natural capacity. Levinz, 237; Owen, 73; 2 Anderson, 107; 1 Blackf. Ind. R. 267; 2 Bacon's Abr. 32; 4 Comyn's Dig. 273; 1 Bla. Com. 484; 2 Kyd on Cor. 516; 2 Kent's Com. 307–309; Ang. & Ames on Cor. 513. In the case of *The*

Digitized by Google

Commercial Bank v. *Samuel Lockwood's Administrator*, 2 Harr. Del. R. 13, the court say: "Lands and tenements and goods and chattels, are matters of substance; they are tangible; they have not merely an ideal being, but an actual existence, although they may be without an owner in being, or in expectancy. It is not essential to their existence that they should have an owner; they pass, on the civil death of a corporation, from its hands, but they are not annihilated; they still exist and continue in being, and may be occupied and used by those who may take possession of them, as they retain their being and remain the subjects of occupancy and possession; the grantor of the lands can lay hold of them, and the state, through its proper agent, can take possession of the goods and chattels which belonged to such corporation. But such is not the character or condition of debts owing to such corporation; they are merely rights; things incorporeal, which rest in action; they have an ideal, but not an actual existence — they are neither tangible, nor the subjects of occupancy or possession. In all the books which treat of the civil death of a corporation, debts are considered as not within the terms personal estate, or as embraced within that general class, but when spoken of are distinguished from personal estate. They do not pass to the people in this country, nor to the crown in England, as is the case with the personal estate, that is, the goods and chattels; nor could the state or crown recover them by suit upon the dissolution of the corporation. They have not, like real or personal property, a necessary existence. It is essential, to the continuance of that existence which belongs to their condition, that there should be either in actual being, or in expectancy, with the possibility of an actual being, two parties — one to do, and another to accept the thing done — a debtor and a creditor — a payer and payee; and if the debtor or creditor, payer or payee, dies a natural or civil death, without a representative, or the possibility of a representative, the debt ceases to exist, and the obligation of payment is forever at an end. When the law speaks of a right or obligation as *extinguished*, it means that it is put out, taken away, destroyed. Coke Litt. 147, b;

Digitized by Google

1 Rolle's Abr. 933. If one has a rent-charge, and buys the whole, or a part of the land from which it issues, the rent-charge is thereby extinguished. It cannot be revived, and the land is forever free and discharged from it. Coke Litt. 148, a. If a creditor accept from his debtor a security for his debt of a higher grade, the law holds the original debt to be extinguished. It is at an end, and can never be sued on. Yelv. 38; 6 Coke, 44, b; Powell on Cont. 254; Peters's Cond. R. 290, notes. At common law, if a creditor makes his debtor his executor, the debt is extinguished, and will not revive on the subsequent death of such executor. 1 Atk. 461."

A written opinion, by Chancellor Kent, on the statute of 1843, was read in the argument of this cause, and relied upon to show that the common law consequences of a dissolution of a corporation do not apply to the moneyed corporations of this country. A sufficient reply to Chancellor Kent's written opinion may be found in the printed commentaries of that distinguished jurist on "American Law," vol. 2, p. 304, 307; where he uses the following language: "Civil corporations, either public, as the corporations of towns and cities, or private, as banking, insurance, manufacturing, and other companies of a like nature, are subject to the general law of the land, and amenable to the judicial tribunals for the exercise and abuse of their powers. According to the settled law of the land, where there is no special statute provision to the contrary, upon the civil death of a corporation, all its real estate remaining unsold, reverts back to the original grantor and his heirs. The debts due to and from the corporation are all extinguished. Neither the stockholders nor the directors, nor trustees of the corporation can recover these debts, or be charged with them in their natural capacity. All the personal estate of the corporation vests in the people, as succeeding to this right and prerogative of the crown at common law." In support of this position, he cites *Edmunds* v. *Brown & Sillard*, 1 Lev. R. 237; Co. Litt. 13 b.; 3 Burr. R. 1868; 1 Black. Com. 484; 2 Kyd. on Cor. 516; *State Bank* v. *The State*, 1 Black. Ind. R. 267. Many others of equal authority might be cited to the same point. From the

Digitized by Google

foregoing quotations, it must be seen that Chancellor Kent has included *banks*, insurance companies, and all other corporations in this country, as being subject to the common law consequences of a dissolution, when no special statutory provision is made to the contrary. I feel inclined to give more weight to the views of Chancellor Kent as a commentator upon American law, than to his private opinion read in this cause, more especially as the main point upon which this cause turns was not considered by him.

Having shown the common law consequences which flow from the judgment rendered against the Bank of Port Gibson, the next question presented, is, can the trustees, appointed for that purpose, proceed to collect the rights and credits which were of the dissolved corporation? In order to effect this object, it must appear from the statute that the legislature has directed only a partial seizure of the franchises of the bank, and that the privileges of holding property, suing, and being sued, and of collecting and paying debts which belonged to the bank, are not to be seized into the hands of the state, but to be continued in the trustees directed to be appointed; for, if these franchises are seized into the hands of the state, it produces a total extinguishment of all the debts due to and from the bank, so that neither the franchises of the bank nor the power to enforce its obligations can be revived either by legislative enactment or the interposition of a court of law or equity. Willc. on Cor. 185. In the case of *The Commercial Bank* v. *Lockwood's Administrator*, previously cited, the charter of the bank expired by limitation. Two years subsequently to that event, the legislature of Maryland passed an act declaring the corporation to be revived and continued from the date of the expiration of the charter, with the same powers, privileges, rights and immunities which had been granted by its original charter. Under this act of revival, the Commercial Bank issued a *scire facias* on a judgment obtained by the bank previously to the expiration of its charter, against Samuel Lockwood, to revive said judgment. Upon full consideration of the case, and a review of all the English and American authorities, the court decided,

Digitized by Google

that the act of the legislature, reviving the corporation, did not revive the judgment against Lockwood. The court also decided in general terms, that it was not in the power of the legislature, by renewing the charter of the bank, to revive the liabilities to the same. In the case of *Fox* v. *Horah*, 1 Ired. Eq. N. C. R. 358; Horah was the cashier of the State Bank, of North Carolina, and the notes discounted by the bank, were made payable to Horah as cashier, for the use and benefit of the bank. The bank held a note of Fox, and Horah sued on the note. While suit was pending, the charter of the bank expired by limitation; Horah, nevertheless, obtained his judgment at law against Fox, who then filed his bill in chancery, setting forth the dissolution of the corporation, and praying a perpetual injunction against the judgment at law. In defence of this bill Horah set up that the legal title to the judgment was not in the bank, but in himself, and that upon dissolution of the corporation, he became a trustee in equity for the creditors thereof. The cause was argued before that distinguished jurist, Judge Gaston, who, in a very elaborate and learned opinion, decided that, notwithstanding the legal title to the note, and the judgment thereon was in Horah, the equitable interest was in the bank, and that the expiration of the charter of the bank so extinguished the debt due on the note and judgment against Fox, that the same could not be collected either at law or in equity. The consequences of a judicial seizure of all the franchises of a corporation are the same as those of a dissolution by expiration of charter. Kent's Com. 2, 307; Ang. & Ames on Cor. 2d ed. 667; 1 Blackf. Ind. R. 267; 1 Black. Com. 484; Co. Litt. 13 b.; 3 Burr. R. 1868; 2 Kyd on Cor. 516. These eminent authorities are deemed sufficient to establish the foregoing propositions.

In the written opinion of Chancellor Kent, cited in this cause, the case of *Mumma* v. *The Potomac Company*, 8 Peters R. 281, was claimed as an authority to show, that the death of a corporation no more impairs the obligation of its contracts than the death of a private person. From an examination of that case, it will be seen that Chancellor Kent has mistaken the prin-

Digitized by Google

ciple there decided. The charter of the Potomac Company was never seized into the hands of the state, nor did it expire by limitation. But the legislature of Virginia, during the existence of said charter, incorporated the Chesapeake and Ohio Canal Company, conferring all the powers and rights of the Potomac Company upon the Chesapeake and Ohio Canal Company; and further providing that, upon the acceptance by the Potomac Company of the provisions incorporating the Chesapeake and Ohio Canal Company, the charter of the Potomac Company should be vacated and annulled. The Potomac Company accepted the provisions of said act, and by deed conveyed in due form of law to the Chesapeake and Ohio Canal Company, all the property, rights, credits and privileges owned, possessed and enjoyed by the said Potomac Company, and the Chesapeake and Ohio Canal Company accepted the said conveyance, and took possession of the property, rights and franchises thereby surrendered. The charter of the Chesapeake and Ohio Canal Company also provided, that in consideration of this conveyance, said company should become liable for, and pay the debts of the Potomac Company. From this it will be seen, that the corporate franchises of the Potomac Company were continued in the Chesapeake and Ohio Canal Company, and that the said franchises did not, for a single instant of time, cease to exist. The whole case was a matter of contract between two existing corporations, under the sanction of the legislature. Previously to the surrender of its charter by the Potomac Company, Mumma had obtained a judgment against it, but, before the collection of the money, the franchises and property of the company were legally conveyed to the Chesapeake and Ohio Canal Company. Under this state of case, Mumma issued a *scire facias* to revive his judgment against the Potomac Company, upon the ground that the surrender of the franchises and property of the Potomac Company, violated its obligation of contract, and derived no legal effect from the legislative acts which authorized the same. In other words, that the law authorizing said surrender was unconstitutional. This was the only point before the court, and the decision was that said

Digitized by Google

law was constitutional — that the Chesapeake and Ohio Canal Company were liable to pay the debts of the Potomac Company; that, under said law, the property transferred by the Potomac Company to the Chesapeake and Ohio Canal Company, by virtue of the mutual agreements between said companies, became a trust fund for the payment of the creditors of the Potomac Company, and that said creditors could enforce their claims against any of said property which had not passed into the hands of *bona fide* purchasers. The *scire facias* of Mumma was disallowed, and he, thereby, compelled to resort to the Chesapeake and Ohio Canal Company for redress. This case, therefore, only decides that where a corporation is continued in new corporators, such continuance carries with it all the obligations of the old corporators. The case does not conflict with the authorities heretofore cited by me, nor with any legal principle which applies to the case at bar.

That the doctrine heretofore laid down is recognized throughout the United States, is further evident from the legislation of the different states, in avoidance of the common law consequences of the dissolution of a corporation. In New York and Connecticut, it is provided that upon proof of cause of forfeiture in a corporation, the chancery court shall issue an injunction against such corporation, restraining it from the exercise of its franchises, and shall appoint a receiver to collect the property, moneys and effects of the corporation, and to distribute the same among its creditors, but the state does not seize the franchises. *Bank of Columbia* v. *The Attorney-General*, 3 Wend. 590; Laws of Connecticut, 1837. In Massachusetts, Vermont, Indiana, Michigan and Wisconsin, on proof of cause of forfeiture, the corporation is continued for the term of three years for the purpose of settling the affairs of the corporation. *Folger* v. *Chase*, 18 Pick. 66; Rev. Stat. Vt. 383, § 17; Rev. Stat. Ind. 1843, 587, § 19; Rev. Stat. Mich. 229, § 7; Laws of Wisconsin, 1838, 146, § 3. In Ohio, commissioners are appointed with power to sue for and collect any claims, or recover any property of the corporation dissolved, for the use of its creditors in the same way and to the same extent said corporation

Digitized by Google

could sue and recover, and the powers of the corporation are continued in the commissioners to the extent necessary for the faithful discharge of those duties. *Miami Exporting Co. v. Gano et als.* 13 Ohio R. 270. In Maryland, the state entirely waives its right of forfeiture, and provides that on proof of any cause of forfeiture, and after a full investigation of the concerns and situation of a bank, the court may, if in their judgment and opinion the public interest shall require it, adjudge the charter of the bank to be forfeited, but the franchises are not directed to be seized. Three commissioners are appointed to settle and close the concerns of the bank, and the officers of the bank are directed to deliver up all the property of the bank to said commissioners, who are authorized to recover any debt due to the bank, in a suit to be instituted in the corporate name or style of the bank. Laws of Maryland, (Dorsey,) vol. 1. 695, 696, § 5, 6, 10. This amounts to a mere ouster of the corporators, and continues the corporation in the commissioners. Not having the statutes of the other states within my reach, the investigation on this subject must end here. But enough has been seen to show, that in all the states previously named, the legislatures have provided, that on proof of cause of forfeiture of a corporation, the franchises are not totally seized, but that either the corporations themselves are continued bodies corporate for certain purposes, or the franchises and property are continued in other persons.

A comparison between the statutes above quoted and the one now before the court, is satisfactory to my mind that the latter does not in terms continue the corporation, and I have sought in vain through every section of the act for the development of any such intention on the part of the legislature. It may be said that the provision that, on the judgment of forfeiture, the debtors of the bank shall not be released from their liabilities to the same, necessarily implies a continuance of the corporation, inasmuch as the debts could not survive without such continuance. An examination of the whole act, however, shows that the legislature have authorized, on proof of common law causes of forfeiture, a common law judgment of forfeiture, the conse-

Digitized by Google

quences of which are a total extinguishment of all debts due to and from the bank, and the reversion of its real estate to the grantor and his heirs. On such judgment, the ownership of the real estate is a vested right in the grantor and his heirs, and the extinguishment of the debts due to the bank is a vested right in favor of the debtors. 2 Kent's Com. 309; 1 Blackford's Ind. R. 267. After suffering a judgment of forfeiture and seizure of the franchises of the bank, as is the case of the Bank of Port Gibson, the legislature had no right to seize upon any portion of the assets of the bank, except the personal estate, which, by law, vested in the state upon such a judgment. The direction of the legislature that the trustees shall take possession of the rights and credits, and sell the real estate of the bank, is unconstitutional, because it interferes with vested rights. It is an attempt to make a new contract, or rather, to create a debt and make it binding upon the debtor without his consent or knowledge. Such a power does not pertain to the legislatures of this country. Its exercise is against common right and reason, and in violation of those great primary fundamental principles of liberty and natural justice, upon which all legislative action is predicated in a republican government. 2 Harrington Del. R. 18. The collection of a debt, after the same has become extinguished, is an impossibility, and the law directing such a thing, upon long established principles, is a nullity. That the legislature intended that the debt due the bank should be collected, I do not doubt, but unfortunately they have destroyed the only means by which such collection could be made, and to hold that the statute, in attempting to continue the debts under the circumstances here presented, necessarily perpetuates the corporation, would be a view of the law to which I cannot subscribe. In this view of the case, I am sustained by the opinion of Judge Story, in the case of *Mumma* v. *The Potomac Company*, heretofore cited. He lays down the principle in the following language: "A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and nonuser. Every creditor must be presumed to under-

Digitized by Google

stand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter."

In the case of *The State* v. *The State Bank of Indiana*, 1 Blackf. Ind. R. 267, a similar authority is found. In the year 1821, it was suggested to the legislature of that state, that said banking company had violated their charter, whereupon an act was passed directing the governor to appoint an agent to cause suit to be instituted against the bank in the name of the state, for the purpose of determining whether they had violated their charter. The legislature further provided that on judgment of forfeiture and seizure of the franchises of the bank, the goods and chattels, rights, credits, and effects, lands, tenements, &c. of the corporation, should be seized upon by the executive on the judgment of forfeiture, and the same to be delivered to the commissioners appointed by the other provisions of the act. Under this act, an information was filed against this bank, and, on trial of the causes of forfeiture set up in the pleadings, the bank was convicted and judgment was rendered "that the privileges, liberties and franchises of said president, directors and company of said bank be seized into the hands and custody of the state, together with all and singular their goods and chattels, rights, credits and effects, and all and singular their lands, tenements and hereditaments of what kind, nature and description soever, with costs." On appeal from this judgment, the supreme court of Indiana, after deciding that that portion of the judgment which directs a seizure of the franchises of the bank was lawful, make use of the following language: "But when we proceed to that part of the judgment, that authorizes a seizure into the hands of the state of all the goods and chattels, rights and credits and effects, together with all and singular the lands, tenements and hereditaments of the corporation, we are compelled to pause and minutely examine the ground on which this part of the judgment has been founded. We are aware

Digitized by Google

that several sections of the act of assembly, directing these proceedings against this corporation, are predicated upon the idea that if the corporation had so misused and abused its franchises as to render them liable to seizure, a seizure of the goods and chattels, rights, credits and effects, lands, tenements, &c. of the corporation, would necessarily form a part of the judgment; for the third section of the act directs them to be seized by the execution on the judgment. But we cannot suppose that the legislature intended to alter the law on this subject, for their provisions extend only to this particular case; and even if those provisions were of a general nature, we should have to give them a retrospective operation to bring this case within them, inasmuch as all the causes of forfeiture to which this corporation was liable, were incurred before the passage of the act. In fact, the act does not seem intended to increase the liabilities of the corporation, or in any way to extend the forfeiture to which they were subject." The court then proceed to examine the common law consequences of the dissolution of a corporation, and lay down the law as set forth upon that point in a previous part of the opinion, and conclude by saying, "nor does the act of assembly authorizing the collection of the corporation debts by commissioners, to be appointed for that purpose, make any alteration in the case. . . . There is nothing in the act calculated to give those debts a continued existence, after the dissolution of the corporation. The act only presumes that they would, by law, have such an existence. The debts must, therefore, be considered, on common law principles, unaffected by the act, and therefore subject to an extinguishment by a dissolution of the corporation."

The principles established by this case are, to my mind, decisive of the one at bar. The legislature of Mississippi, like that of Indiana, appear to have acted upon the assumption that upon a dissolution of a corporation the state had a right to seize all its assets, and to dispose of them by legislative enactment. They have not provided that, on judgment of forfeiture, the debts owed by the bank should not be extinguished; nor have they provided that the real estate should not revert to the origi-

Digitized by Google

nal grantor and his heirs. They suffer the debts owed by the bank to be extinguished, and the real estate to revert to the grantor and his heirs, and, at the same time, direct that the real property shall be seized by the trustees, and sold. These trustees are not made amenable to the court appointing the same, nor to any other court, but are clothed with the mere duty of collecting the assets which were of the dissolved corporation, and to hold the same, subject to the future order of the legislature; they have no authority to make distribution of the funds collected by them; they cannot be sued by creditors. A refusal on the part of the trustees to make distribution to creditors would not be a breach of their bond, because the condition of their bond is "to diligently and faithfully collect the debts due such bank, &c.; to sell and dispose of the property belonging to same, and the proceeds, when collected, to pay over, as may hereafter be directed by law." The trustees are therefore state officers, with a tenure of office unlimited as to duration, amenable and accountable only to the legislature. And if the legislature fail to direct distribution to the creditors, the latter have no remedy.

It may be said, that the statute shows an intention, upon the part of the legislature, to make distribution to the creditors at some future day. In answer to this it may be replied, that there are now no creditors of the bank of Port Gibson in existence. By the judgment rendered against this bank of Port Gibson, all the claims of its creditors were totally extinguished. The legislature not having declared that this common law consequence should not follow the judgment of forfeiture, the common law in this particular remains in full force. This point was expressly decided in the case of *Fox* v. *Horah*. After giving the reasons why goods and chattels of a corporation revert to the state, Judge Gaston says, "Choses in action are under the operation of a different rule. They are rights of the corporation to demand money in the hands of persons by whom it was withheld. They derive their existence from contracts, or *quasi* contracts, by which the relation of debtor and creditor was created. Where the creditor corporation died, and there

Digitized by Google

was no successor, no representative, the relation of debtor and creditor ceased, and the debt became necessarily extinct.. None but the creditor had a right to demand the money, and when his right is gone, the money becomes, to all purposes, the money of the possessor." The claims of the creditors against the Bank of Port Gibson are choses in action, and, under the above rule, were extinguished by the judgment of forfeiture. Again, it will be recollected that the trustees, appointed under the act of 1843, are not trustees for the creditors, but the mere officers or agents of the state, who has assumed to herself to become trustee, under the pretence that at some future day, when it may suit her will and pleasure, she will pass a law to make distribution to the creditors of the late bank of Port Gibson. The state, being a sovereign power, cannot be compelled to make distribution of any assets that may come to her possession. In the case of *Fox* v. *Horah*, the latter set up, as the state does here, that he was a trustee for the benefit of the creditors of the bank of North Carolina. In considering this point, Judge Gaston says, "This brings us to the direct consideration of the great question in the case; Is it against conscience in the defendant (Horah) to collect the judgment? In presenting this inquiry, we may dismiss from our consideration the purposes to which the defendant professes an intention to apply the money when collected. It is not to be questioned, we think, that on the expiration of the charter, the debts of every kind due from the bank were extinguished as completely as the debts due to it. The stockholders, as such, were not responsible for those debts, and the expiration of the charter did not throw upon them any such responsibility. There are, therefore, no outstanding demands against the late corporation, or those who were stockholders therein, which in law or equity can claim to be satisfied out of the money which the defendant seeks to collect. If he collects it, he cannot be compelled to account therefor to any one, and may therefore keep it to his own use. We can pay no respect to a pretended trust, the performance or non-performance of which is dependent upon the will of the supposed trustee. If the defendant can rightfully collect this

Digitized by Google

money, it is because he has a right to collect it for his own benefit. After much consideration, we are of opinion that he has not a right to collect it for his own benefit." The performance of the trust, either by the trustees, so styled, or the state of Mississippi, depends entirely upon the future will and pleasure of the legislature. There is no judicial power in this government which can enforce the trust. If, then, the debts are collected, they are collected for the use and benefit of the state.

Another serious question arises in this branch of the case. The distribution of assets among creditors is a judicial act. The claims of creditors can only be settled by an exercise of judicial power, and final distribution to them can only be made by the judgment or decree of a court of competent jurisdiction. If, therefore, the legislature should, at any future day, direct by law the distribution of the assets of the late Bank of Port Gibson to the individual creditors thereof, and allot the portion due to each, it would be a usurpation of judicial power, and, as such, a plain and manifest violation of the constitution. This extraordinary assumption of power on the part of the legislature can only be accounted for upon the supposition that they regarded all the assets of the dissolved corporation as reverting to the state by operation of law, and that therefore they had a right to dispose of them as of any other fund belonging to the state.

According to the foregoing view which I have taken of this case, the trustees, appointed by the circuit court to take possession of the assets of the late Bank of Port Gibson, can take nothing except the goods and chattels owned by the bank at the time of its dissolution. The state has a vested right in the personal estate of the late Bank of Port Gibson, and, if she chooses, she can by law donate the same to the late creditors of this bank.

Messrs. H. T. Ellett and *George L. Potter*, counsel for Nevitt, filed the following petition for a re-argument:

The bill was filed to enjoin execution on a judgment ren-

Digitized by Google

dered on a promissory note in favor of the bank against Nevitt, and forthcoming bond forfeited on execution thereon.

On the former argument it was urged that, because the bank was extinct, the judgment had become ineffectual, so that no execution could ever be issued thereon, and so the subject-matter of the litigation presented by said bill was determined and gone; that, as no person could now have execution on said judgment, Nevitt could not be compelled here further to litigate, whether or not the bank, during its existence, was entitled to execution thereon. It was especially insisted that, for want of privity, said trustees could not in any manner have execution on said judgment. Many authorities were cited to sustain this position, but the point was not decided by the court. As this is a point directly involved in the motion, it is important to all parties that it should be adjudged; if decided for Nevitt the motion must be overruled.

2. It was further urged that said judgment debt, and the note whereon the same was obtained, was and became, by the extinction of the bank, wholly extinct and gone; that said contract was so extinct, under and by force of a condition in law thereto annexed, that the same could not be revived or enforced, without impairing the obligation of the contract; that said condition in law was this, that in the event of the dissolution of said bank, the contract should cease and determine.

The court decided against this point, mainly, it would seem, on the authority of a decision in 3 How. Sup. C. R. 534. It is respectfully submitted that, as that case was decided on the rule of a penalty, and no contract, it affords no answer in the premises. It is admitted that the state may waive a forfeiture, and may continue the existence of the corporation, so that the condition which will defeat the contract, may never attach; but, if the corporation be dissolved, the contract ceases with it. In this case the state has destroyed the corporation; it has done nothing "to release or remit" a dissolution of the corporate body.

The following extracts from decisions will best explain how it was that this bank and this contract became extinct together:

Digitized by Google

"Those laws which in any manner affect the contract, whether in its construction, the mode of discharging it, or which control the obligation which the contract imposes, are essentially incorporated with the contract itself." *Campanque* v. *Burrell*, 1 Wash. C. C. R. 341, cited with approbation by Thompson, J. 12 Wheat. 297.

Per Story, J.: "The recognizance of special bail being part of the proceedings on a suit, and subject to the regulations of the court, the nature, extent and limitations of the responsibility created thereby, are to be decided, not by a mere examination of the terms of the instrument, but by a reference to the known rules of the court and the principles of law applicable thereto. Whatever in the sense of those rules and principles will constitute a discharge of the liability of special bail, must be deemed included in the purview of the instrument as if it were expressly stated." *Beers* v. *Houghton*, 9 Pet. 356.

With this understanding of the law of contracts, the same learned jurist declared, "Every creditor must be presumed to understand the nature and incidents (dissolution, &c.) of such a body politic, (a corporation) and to contract with reference to them." *Mumma* v. *Potomac Co.* 8 Pet. 287. Again he declared, "The bond of the cashier must be construed to cover all defaults in duty, which are annexed to the office from time to time, by those who are authorized to control the affairs of the bank; and sureties are presumed to enter into the contract, with reference to the rights and authorities of the president and directors, under the charter and by-laws." *Minor* v. *Mechanics Bank*, 1 Pet. 73.

So by Chancellor Kent: "It is an implied condition of every contract, that the party shall be absolved from its performance, if the event takes place which the existing law declares shall dispense with the performance." 1 Comm. 421.

So, Baldwin, J., speaking of a custom, declares: "A general custom is a general law, and forms the law of a contract on the subject-matter; it enters into and controls its stipulations, as an act of parliament or state legislature." *United States* v. *Arredondo*, 6 Pet. 715.

Digitized by Google

Again, "It may be assumed as a rule affecting all personal contracts, that they are subject to all the consequences attached to contracts of a similar nature by the laws of the country where they are made. The contract being made under the law, is presumed to be made with reference to it. A law providing for the discharge of a debtor when the contract was formed, the contract must be held subject to that law, because it was made with an implied reference to it." *Blanchard* v. *Russell*, 13 Mass. R. 5, 16, 17.

"The parties are as much bound by provisions contained in a law, as if the provisions had been inserted in and formed a part of the contract." *Smith* v. *Parsons*, 1 Ohio, 113.

Where it (the law) affixes a penalty to the non-performance of a contract, and a party enter into such contract, he contracts in reference to the penalty, and it is as much his penalty as if he had inserted it in his written agreement." *Talvande* v. *Cripps*, 3 M'Cord, 157.

The same principles were declared by three out of six judges in *Ogden* v. *Saunders*, 12 Wheaton. Per Washington, J.: "The law, which accompanies the contract as forming part of it, is regarded and enforced everywhere, whether it effect the validity, construction, or discharge of the contract." page 259. Per Thompson, J.: "Parties must be understood as making contracts with reference to existing laws, and impliedly assenting that such contracts are to be construed, governed and controlled by such laws." p. 297. He adopts the language of Washington, J. before quoted from. 1 Wash. C. C. R. 341. Per Trimble, J.: "In the case at bar, the contract was made in the state, and the law of the state at the time it was made, in effect provided that the obligation of the contract should not be absolute, but qualified by the condition that the party should be discharged upon his becoming insolvent, and complying with the requisitions of the insolvent law. This qualification attached to the contract by law, the moment the contract was made, and travelled with it through all its stages of existence until the condition was consummated by the final certificate of discharge." "It is in the nature of a condition subsequent, an-

Digitized by Google

nexed by operation of law to the contract at the moment of its creation." p. 324.

It is true that judges Marshall, Story and Duvall dissented from these conclusions; but in how far Judge Story afterward concurred, may be read in the above extracts from his opinions.

The following extract shows that Chief Justice Marshall has to some extent yielded his opinion:

"The allowance of three days of grace, is a usage which pervades the whole commercial world. It is now universally understood to enter into every bill, or note, of a mercantile character, and to form so completely a part of the contract, that the bill does not become due, in fact, or in law, on the day mentioned on its face, but on the last day of grace." Per Marshall. *Bank of Washington* v. *Triplett*, 1 Pet. 31; see also *Van Ness* v. *Pacard*, 2 Pet. 148.

In this view the supreme court declared the statute laws of Illinois were "as much a part of the contract as if they had been set forth in its stipulations in the very words of the law." *McCracken* v. *Hayward*, 2 How. 613. For this reason that court declared this rule: "Mortgages made since the passage of these laws must undoubtedly be governed by them; for every state has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale, for the payment of a debt, and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions; and they would be obligatory upon the parties in the courts of the United States, as well as in those of the state." *Bronson* v. *Kinzie*, 1 How. 321. So fully is this doctrine recognized that the supreme court of New York, by Spencer, J., declare that it is "universally recognized in courts of justice," and they declared upon the New York insolvent act of 1813.

"It is the same, then, in effect as if the insolvent act of April, 1813, had been expressly inserted in the contract, on which the judgment in this case was rendered, and the substance of the contract between the parties is, that the contract shall be literally fulfilled, unless the defendant becomes an insolvent debtor, within

Digitized by Google

the meaning of the act of 1813, and is duly discharged from his debts." *Mather* v. *Bush*, 16 Johns. 249, 250.

In this view, Thompson, J. declared: "When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties." *Thompson* v. *Vetcham*, 8 Johns. 192; and Brougham, delivering his opinion in the house of lords, expressed the same idea: "The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract." Cited Story Confl. Laws, sec. 226, c. note 2. Judge story presents the same point in his doubt if a note not assignable when made, can become transferable by any subsequent law, "since (says he) it (the transfer) seems to concern the interpretation and obligation of the contract." Conflict Laws, sec. 357.

In the same sense he declares, "Payment or extinction, according to the laws of the place of the contract, is payment or extinction of the debt everywhere." 2 Mason R. 166. And further, "The obligation of a contract is the duty to perform it whatever may be its nature, that is, the right to performance which the law confers on one party, and the corresponding duty of performance to which it binds the other; the law may limit the extent and force of that obligation *in personam* or *in rem*. It may bind the party personally, but not bind his estate; or it may bind his estate and not bind his person; or it may be revocable or dissoluble, in certain future events, or under peculiar circumstances." Confl. Laws, sec. 266. The doctrine of these extracts is no "Mississippi novelty;" it was declared as early as 1797. In *Melan* v. *Fitz James*, 1 B. & P. 142, Rooke, J. declared, "If the law of France has said that the person shall not be liable on such contract, it is the same as if the law of France had been expressly inserted in the contract." In *Talleyrand* v. *Boulanger*, 3 Ves. jr. 449, Lord Rosslyn adopted the same principle.

The same rule was expressed and applied in the case of a bank charter in *McLaren* v. *Pennington*, 1 Paige, 108, 109. So in an action on a note made and indorsed in Illinois, the supreme court of Massachusetts declared the same rule.

Digitized by Google

"By the law of Illinois, the indorser is liable only after a judgment against the maker; and as no such judgment appears to have been obtained on this note, the condition upon which alone the plaintiff may sue is not complied with, and therefore the action cannot be maintained. The law in question does not effect the remedy, but goes to create, limit, and modify the contract effected by the fact of indorsement. In that which gives force and effect to the contract, and imposes restrictions and modifications upon it, the law of the place must prevail," &c. *Williams* v. *Wade*, 1 Metcalf, 83.

These authorities are sufficient to show in what sense we insist that the law in force at the date of the contract, so enters into and controls the contract, that the happening of any contingency which would, under the law existing when the contract was made, discharge it, will in all time subsequent operate and determine the contract. We repeat the language of Kent, as an apt summary of these cases: "It is an implied condition of every contract that the party shall be absolved from its performance, if the event takes place which the existing law declares shall dispense with the performance." 1 Comm. 421. It matters not whether it be said that the law enters into and forms a part of the contract, or that parties so contract with reference to the existing laws and to the consequences, in relation to the discharge of the obligation which those laws declare shall attach in a given contingency; all we ask is that you look to the laws in force at the date of the contract as creating the obligation and prescribing how it may be discharged or become null, as the true criterion of the intent of the parties. Beyond all question the law at the date of this contract was, that in the event of the dissolution of the corporation, the contract should become and be extinct. We say that a tacit condition in law annexed to the contract was, that in the event of such dissolution occurring whilst the bank held this contract, Nevitt should be "absolved" from performance. The same rule is laid down by Coke in relation to grants of realty to a corporation; (Co. Lit. 13, b.); and it is worthy of remark that at the time when Coke wrote, a corporation might defeat the condition of reverter

Digitized by Google

by a conveyance of the lands; this was not inconsistent with the condition, for the power so to convey was also incident to the grant.

So, by the very terms of the contract, a bank may transfer a negotiable note, and prevent the operation of the condition to which we refer; this results also from the express or implied promise of the contracting parties. If the law in force at the time recognized the equitable rights of a transferee of paper not negotiable, a transfer of such a note would come within our rule, and the promisor would be held to have contracted with reference to the right of the bank to transfer such an equity. The case of *Lenox* v. *Roberts*, 3 Wheat. 376, decides nothing more.

The case of *Maryland* v. *Baltimore and Ohio Railroad Co.*, 3 How. 534, is not an authority against our position. We assert that, under and by force of a condition in law annexed to his contract in its creation, Nevitt is released from his obligation; it is no answer to say the state may waive or remit a penalty, or to say the state has in part changed the consequences of a judicial forfeiture. The condition of discharge relates to a dissolution of the corporation, whether it be by a judgment or by limitation; and the state has dissolved the corporation; it matters not whether or not the state has waived or changed any effect or consequence of a dissolution, for the state cannot both dissolve the corporation and annul a condition of this contract. A review of the extracts before quoted will show that the rule on which we rely does not relate to future legislation as affecting the contract, much less does it relate to the power of legislation. If it be insisted that contracts are to be interpreted with reference to all the tacit conditions annexed to the contract by the existing law in reference to which the parties contracted, will the court declare that the contracting parties had reference also to the legislative power and to future legislation? Will these, as does the existing law, declare the intent of the parties, at the date of the contract? This condition on which the contract may cease, is of the obligation of the contract, and in no sense relates to the remedy to enforce it.

Digitized by Google

It is further submitted, that the decisions in *Bank of Maryland* v. *Ruff*, 7 Gill & Johns. 465; *Bank of Columbia* v. *Attorney-General*, 3 Wend. 600; 13 Ohio R. 270, are not authorities against our position.

In *Bank of Maryland* v. *Ruff*, the decision was upon an assignment made by the bank to trustees, and the question was upon the right of the trustees to receive the issues of the bank in payment of its debts. This point was decided in the affirmative upon the statute of Maryland, and *this*, it is conceived, is the point there said to have been decided by the supreme court of the United States.

The cases in 3 Wendell and 13 Ohio, both refer to the bank insolvent laws of New York and Ohio; by which laws a receiver is appointed over the insolvent bank, but the corporation is not dissolved. This point has been expressly adjudged. *Bank of Niagara* v. *Johnson*, 8 Wend. 645.

In 3 Wendell, the court expressly waived the constitutional question, whether the state had the power to provide for the appointment of such receiver. In 13 Ohio, it was suggested that the corporation had been subjected to the law, and the court merely referred to the clauses of the statute which provided, that in such case, the receivers or trustees should sue. The validity of the act was not in question, nor was it decided. The same may be said of the North Carolina act; it was merely referred to in *Fox* v. *Horah*, with the remark that it did not reach the case under consideration. The North Carolina act differed from ours in this; it provided that the debts to and from the corporation should not be "*extinguished*" — we are not aware if the validity of the act has been tested.

In New York, Missouri and New Jersey, it is provided, that on the dissolution of a corporation, its president and directors shall be trustees to close its concerns; thus continuing the corporation in these officers. In Rhode Island and Georgia, the corporate existence is continued after judgment of forfeiture, for the purposes of suits and settlements.

In Maine, Wisconsin, Michigan, Vermont and Massachusetts, banking corporations are continued for three years after their

Digitized by Google

charters are annulled, or gone by judgment of forfeiture, or by limitation, for purposes of suits and settlements.

In Pennsylvania, banks, after they are proclaimed forfeited, are continued for suit and settlement. The necessity of these provisions, to prevent an extinction of the debts, is declared in *Folger* v. *Chase*, 18 Pick. 66.

In Connecticut, Maine, New York, New Jersey, Ohio, Tennessee, Massachusetts, Michigan and Vermont, there are insolvent bank laws, under which commissioners, &c. wind up the affairs of the bank, but the corporations are not destroyed.

In Indiana, by the act of 1824, the credits and estates of corporations vested in the state, in her declared conjoint capacity of heir and administrator. In the revised acts, 1845, on judgment of forfeiture, the state attorney is required to apply for an injunction and receiver against the corporation, which shows the corporation is not defunct.

In Pennsylvania, New York, Massachusetts and Maine, a general law reserves the legislative power to repeal and alter charters.

See Revised Laws of Maine, p. 329, 759; of Connecticut, p. 94; Wisconsin Laws of 1839; Ohio Rev. 1841, p. 142, acts 1839, 1842; Indiana Rev. 1838, p. 409; Michigan Rev. 1838, p. 229; Massachusetts Rev. 1836, p. 363; North Carolina, acts 1831, 1 Rev. Laws, 1837; Vermont Rev. 1839, p. 383; Missouri Rev. 1845; Tennessee act, 1836; Rhode Island Rev. 1822, p. 435; Pennsylvania acts, 1823, 1824, p. 69; 1818, 1819, act May 21, 1814; Georgia, 1842, p. 29; New Jersey act, 1829; 1 New York Rev. Code, 601, acts 1825.

So far as rules are to be derived from the examples of the other states, it is conceived there is nothing to sustain the ground assumed for this motion, to be found in the enactments referred to. So far as counsel have examined, there is found but one decision which can be said to decide upon the matter in controversy.

In *Lincoln, &c. Bank* v. *Richardson*, 1 Greenl. 79, it was held that a dissolved corporation might be so revived as to enable it to sue a stockholder for a debt due before its dissolu-

Digitized by Google

tion. The case was submitted without argument, and decided in the like manner; it was supposed to be analogous to the case in *Foster* v. *Essex Bank*, 16 Mass. R., but there is no similarity in the cases. A main reason for the decision was the supposed assent of the defendant.

It is further submitted, that the rights of Nevitt cannot be made to depend upon the former action of the court, on another section of the *quo warranto* act. He stands upon his contract, and not upon the validity or invalidity of the injunction clause of the statute.

3. It was before urged, that the clause of the act providing that debtors should not be released *by* the judgment of forfeiture, was enacted in misapprehension of law, and was wholly inoperative; that this act and the law of Indiana were both enacted under a like mistake, and, as both appointed persons to collect, a decision on the Indiana act was directly upon the questions of extinction, &c., and fully in point.

4. That the trustees had no legal title to this judgment. The fact that they are required to do other things which can only be done by a transfer to them of the legal property, is not conclusive to show their legal right to this judgment. If it were, then it must be held that what were mere equities in favor of the bank, pass to the trustees as full legal rights. It is conceived that the enactments relative to estates of decedents, are not analogous to the provisions in relation to these trustees. "Executors, &c. shall have full power and authority to commence and prosecute any personal action whatever, at law or in equity, (as the case may require,) which the testator or intestate might have commenced or prosecuted," &c. H. & H. 412, sec. 88. If it be said that, because the legislature may provide for the collection of the debts due a decedent, it may also provide for the collection of debts due a defunct corporation; the answer is, that neither in the one case nor the other could the state so provide, if the debtor contracted with reference to the common law rule, that on the death of a person, natural or corporate, all debts due to that person were *extinguished*. Under existing laws for the collection of debts due a decedent, contracts are not

Digitized by Google

made to a natural person with reference to this rule of common law. Had such statute laws never existed in Mississippi, the rule for which we contend would apply as well to the case of a deceased creditor, as in that of a defunct corporation. The late bankrupt act vests rights of action in the assignee, and directs that "all suits in law or equity, then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to their final conclusion, in the same way, &c. as they might have been by such bankrupt." Sec. 3.

5. If the trusts are so declared by the statute, that a court of equity may enforce them *pro rata* according to the rules of equity, so that the legislature cannot alter the disposition of the trust; can the legislature, under the rule declared by the court on this point, even now declare the order of payment out of the trust property? Has not the judgment of the court placed this subject beyond the legislature?

Mr. Justice CLAYTON delivered the opinion of the court on the application for a re-argument.

The importance of the interests involved in this cause, and other circumstances attending it, induce us to depart from our usual course upon such petitions, and to state somewhat in detail, the reasons which influence our determination.

The petition contains a very elaborate reference to authorities to prove that the existing laws enter into and form part of every contract. In our view, this was wholly beside the matter involved, because in the former opinion it was fully acknowledged, that all legislation which materially affects the laws for the enforcement of a contract, in existence when such contract was made, do impair its obligation. But it was also stated, that the contract of charter between the bank and the state, is one with which the debtors have no concern. By a breach of the conditions implied in every charter, the corporation forfeits its franchises. This forfeiture the legislature has a right to remit in whole or in part.

The petition urges "that the consequences of the forfeiture of charter, enter into and form a part of the contract between

Digitized by Google

the bank and its debtor; and that if the state enforce a forfeiture of the charter, and do not remit the dissolution of the corporate body, the contract ceases with the corporate existence. In other words, not only must the consequences of the forfeiture be remitted, but the existence of the corporation itself must be continued, in order to preserve the contract from extinguishment. The state cannot suffer the corporation to be dissolved, and save the debts due to it from extinction."

We do not think this position has been sustained, either upon authority or reasoning; and we think the contrary can be made manifest by both. We shall for the present lay aside the former opinion in this case, and the authorities there cited, and shall turn to other decisions.

The case of *Mumma* v. *Potomac Company*, 8 Pet. 281, is in my apprehension of it, a direct authority to the contrary. In that case Mumma was a judgment creditor of the Potomac Company at the time of its dissolution. It had surrendered its charter to the Chesapeake and Ohio Canal Company, under the sanction of legislative acts of both Maryland and Virginia, passed upon its own application, and with its own consent. After all this, Mumma issued a *scire facias* to revive his judgment against the Potomac Company. The right to revive was placed upon the ground, that the deed of surrender violated the obligation of the contracts of the company, and that the legislative acts of Maryland and Virginia were on that account void, and without legal effect. On this point the court say: "We are of opinion that the dissolution of the corporation, under the acts of Virginia and Maryland, cannot, in any just sense, be considered within the clause of the constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those states, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bona fide* purchasers; but is still held in trust for the company, or for the stockholders thereof, at the time of its dis-

Digitized by Google

solution, in any mode permitted by the local laws." Language more emphatical, or more to the purpose could not be employed: *the obligation of those contracts survives.* Nor was there any provisions in the charter of the Chesapeake and Ohio Canal Company, that it should pay the debts of the Potomac Company. I have examined not only the statement of the case upon this point, but the original charter of the Chesapeake and Ohio Canal Company, as granted by Virginia, with minute care as to this fact, and the provision does not exist. There was a provision that the debts of the old company should be received in payment of the stock of the new company, "and if any creditor did not vest his demand in such stock, it should be the duty of the new company to pay to such creditor annually, such dividend or proportion of the net amount of the revenues of the Potomac Company, on an average of the last five years preceding the organization of the new company, as the demand of such creditor might bear to the aggregate amount of the debts of the Potomac Company." Virginia Acts of 1824, p. 41. The new company was not bound to pay a dollar of its own funds to the debts of the old. The court further remark: "Here is provided an equitable mode of distributing the assets of the company among its creditors, by an apportionment of its revenues, in the only mode in which it could be practically done upon its dissolution; a mode analogous to the distribution of the assets of a deceased insolvent debtor." The judgment was against Mumma; but in my understanding of the opinion, "he was not thereby compelled to resort to the Chesapeake and Ohio Canal Company for redress," except so far as they were trustees. It does not decide, in my view, "that when a corporation is continued in new corporators, such continuance carries with it all the obligations of the old corporators." It only holds, in the language of the court itself, "that the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company, or for the stockholders thereof at the time of its dissolution, in any mode permitted by the local laws." This mode must be by a pro-

Digitized by Google

ceeding against the new company as trustees or assignees, to subject the trust property. There is not the most remote intimation that Mumma had any right except to pursue the property, which by the surrender and contract of surrender had been converted into an express trust fund for the payment or liquidation of debts. The case is in all respects parallel with this, except that Mumma was a creditor, and Nevitt is a debtor. If this varies the principle, I am unable to perceive it, for the common law rule is, that upon dissolution, "the debts due to and from a corporation are equally extinguished;" and there is no reason why both may not equally claim exemption from the rule, when the legislature shows an intention to alter it. See Story's remarks on this case, 2 Com. Eq. 2d ed. 499, § 1252; *Smith* v. *Chesapeake and Ohio Canal Company*, 14 Pet. R. 45.

Authority equally strong is to be found in the case of *Bleakney* v. *Farmers and Mechanics Bank of Greencastle*, 17 Serg. & Rawle, 65. This was a proceeding against a debtor of the bank. The case expressly decides that if a bank charter be forfeited, and the bank dissolved, and the bank should be afterwards resuscitated, it may collect the debts due to it when the forfeiture took place. The law restoring it "works no injustice, infringes no man's right, and impairs no contract," in the language of the court. It is not necessary for us to go the whole length of this case; but it certainly accords with Mumma's case in the principle, "that the obligation of the contract survives the dissolution." The case of *Lindell* v. *Benton & Kennedy*, 6 Mis. R. 364, is to the same effect. It is there decided, that if a garnishment issue by a creditor of a bank, against its debtor, and be served, such debtor is bound to pay, notwithstanding the charter expire before judgment upon the garnishment." See 7 Met. 340. This is upon the principle that the garnishment is in the nature of an attachment, and operates as a legal assignment of the debt to the creditor. I shall have farther use for this principle before the conclusion. The case of *McLaren* v. *Pennington*, 1 Paige Ch. Rep. 102, which will hereafter be adverted to more particularly on another point, is a strong authority in favor of the constitutionality of this law.

Digitized by Google

It is thus seen that upon the highest authority upon constitutional questions known to our frame of government, it is settled that the obligation of the contract of a corporation survives its dissolution; and that the same principle has been recognized in state courts of great respectability.

Let us now see how the matter stands upon reasoning. It is settled clearly and conclusively, that no one can take advantage of a forfeiture of charter, but the sovereign authority which granted it. Such forfeiture or violation cannot be enforced, or set up in defence by any third person, either directly or collaterally, to avoid compliance with a contract. It can only be done by, and in the name of the government. Ang. & Ames, 664, and the numerous cases cited. If, then, this defence be a vested right; if the contract to pay is at an end, when the charter is forfeited, if a law to continue its obligation be a nullity, where is the remedy of the debtor to enforce it? There is none independent of the will of the government. What is a constitutional right worth, which depends upon the mere will and pleasure of the government for its assertion or enforcement? A constitutional right, without a corresponding remedy is a solecism in terms.

This reasoning is equally true, whether the government enact a law continuing the corporate existence after judgment of forfeiture, or continue modified powers of the corporation in the hands of assignees. It is an entire surrender of the constitutional question, to say the corporate existence may be continued for a qualified purpose, after judgment of forfeiture. The argument is, that by the forfeiture judicially declared, the debtors have a constitutional right to be discharged, because that is a part of the contract. If this be true, the legislature has no power to vary the right a hair's breadth, and every law ever passed on the subject is violative of the constitution, and void. The form of the law can make no difference.

The almost universal prevalence of such enactments in some shape or other in the states of this union, proves that they have their foundation deeply imbedded in an innate sense of justice; and the condemnation of the common law rule by such men as

Digitized by Google

Kent, as Gaston, as Tucker, and many others such as they, shows that it is in utter hostility to the spirit of this age. It belongs to the period when men who could not pay their debts were imprisoned for life, and when the estates of criminals were confiscated to the government; and it should be consigned to the same tomb with these antiquated barbarisms.

If the bank debtors cannot enforce the forfeiture, nor evade the binding force of their contract, without the action of the state; if the state may legally refuse to interpose at all, it follows it must have power to prescribe the extent of its interference. If the legislature may decline to act, it is not a question of right, but of discretion, — it is not a question as to the power to act, but as to the mode of acting.

Let us now look at the argument in another of its phases. It is this, that under statutes of this kind, the debts are extinguished, "unless the corporations themselves are continued bodies corporate for certain purposes, the franchises not being totally seized, or unless the franchises and property are continued in other persons." This doctrine will now be examined.

A charter is not valid until accepted on the part of the corporation. A surrender is not valid without acceptance on the part of the state. A law continuing a body corporate with part only of its franchises in its own hands, or in other hands, would be inoperative until its terms were accepted by the corporation. Whenever a charter or grant operates as a new creation, the new corporation cannot be subject to the liabilities nor possess the rights of the old. Angel & Ames, 54, 658, 668. The *Dartmouth College* case settles the doctrine, "that unless a power be reserved for the purpose, the government cannot, without the consent of the corporation, alter or amend the charter, or add to or diminish the number of trustees, or remove any of the members, or compel it to receive a new charter." 4 Wheat. 518. No new modification of its charter, by which the management of its affairs is taken out of the hands of its officers, and conferred upon others, can be enforced without its consent. This is settled doctrine, if anything in the law is settled. But it may be said, that this is intended to limit the extent of legislative interfer-

Digitized by Google

ence, when no judgment of forfeiture has been pronounced. To a certain extent this is true, but after reaching that limit, the principle is the same after judgment as before. By the judgment of forfeiture, and execution of that judgment, the corporation may be dissolved. Without any express reservation of power for the purpose, for causes judicially ascertained, the state may resume its grant. But when it has done so, the power to force a modification of the original charter upon the corporation is an entirely different matter. Such power does not exist. When the attempt is made, when after a judgment of forfeiture is pronounced and executed, the bank is told it can no longer exist with its old powers, and its former machinery of president and directors, but it is still to be a corporation in the hands of receivers, or trustees, or assignees to wind up its concerns; it may well reply, Stop, pause. I did not make this bond — *non veni in hæc fœdera.* I did not put on these chains; this is not my agreement. You have the power to take away my whole charter under your judgment, or you can take away part of my franchises, provided you leave me enough still to go on. But you cannot force another charter upon me, nor any material modification of this. See 4 Gill & Johns. 1.

If the corporation be continued in the hands of the same corporators, enough of power must be left to them to conduct it. It may be dissolved for certain purposes, or to a certain extent only, but it is wholly dissolved when an integral part is lopped off, without which the functions of the corporation cannot be exercised, and when the corporation has no means of supplying that integral part. 2 Kent, 307; Ang. & Ames, 654; *Lehigh Bridge Co.* v. *Lehigh Coal Co.* 4 Rawle R. 1; *Rex* v. *Passmore*, 3 T. R. 242. The power of perpetual succession, that is, of keeping up its organization, is of the essense of the corporation, one of its inseparable incidents, and indispensable to its existence. 2 Kent, 277; Kyd on Corp. 13; 1 Black. 475; Ang. & Ames, 65. When, therefore, the law, after a judgment, deprives the corporation of this integral part, the power to keep up the succession, it is wholly dissolved, because "an integral part necessary to its vitality is gone, without power in the cor-

Digitized by Google

poration to restore it." This is death, not life — dissolution, not continued existence. 23 Pick. 346.

The case in 8 Peters, already cited, puts the existence of the new corporation upon the voluntary surrender of its franchises by the old, its ratification by the government, and acceptance by the new company. The preamble of the new charter states that it is granted upon that ground. In no other way than by their mutual consent, and the consent of the respective governments, could it have been effected. The case forcibly concludes by stating, "that it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter." The case therefore establishes, that upon a surrender of its charter, an acceptance of that surrender by the government, and a surrender of its assets to pay its debts, a continued existence cannot be forced upon it. The consequence is the same on a judgment of forfeiture executed, as on a voluntary surrender. In each instance the state has given its assent to the dissolution, and when dissolved, whether by surrender or by force of law, a farther existence cannot be forced upon the corporation. It must consent. 9 Gill & Johns. 365.

The attempt to continue the corporation in other hands is equally beyond the sphere of legislative action. If the appointers are to be still regarded as in the exercise of the corporate functions, it falls equally under the condemnation of the constitution, unless the corporation consent. That can hardly be a law which depends for its enforcement upon the consent of those upon whom it is to operate. Judgments are rendered *in invitos*, against the reluctant; they would have little effect if their execution depended upon the consent of those upon whom they bear. Laws, according to a celebrated writer, are made "to guard against what men may do, not to trust to what they will do." If, then, by the settled construction of the constitution, the government cannot amend or alter the charter, or remove any of the members, in what just sense can it be said, "that a judgment of forfeiture may amount to a mere ouster of

Digitized by Google

the corporators, and continue the corporation in the commissioners?" This would indeed be a new contract, without the consent of one of the parties; "and this new corporation could not be subject to the liabilities, nor possess the rights of the old."

Let me not be misunderstood. I do not deny the power of the legislature to provide by law against the common law consequences of dissolution of charter. Nor do I deny its power to direct the court which pronounces the judgment of forfeiture to appoint trustees, assignees, receivers or commissioners, with power to wind up the affairs. That power, in my estimation, is derived from a well-recognized principle, to which I will presently advert. But I do deny, that any law which does not provide for the continued existence of the corporation, is ineffectual to carry out the purposes of the legislature, if it provide for the appintment of trustees. I do deny that the legislature has any power to force a continued existence upon a corporation, after taking away its material franchises under a judgment, striking down its capacity of succession, and of electing its own officers. And I deny the power of continuing the corporate existence in the hands of others, without the consent of the corporation, unless power to do so be reserved in the charter, or unless there be a general law authorizing it to be done, before the creation of such corporation.

A very large number of the states of this Union have passed laws on this subject. There is a good deal of diversity in the details of their provisions, but they all have a common object in view — the alteration of the common law principle of extinguishment, and the application of the assets to the payment of the debts. One class of these statutes directs that the suits which may be brought shall be in the names of the trustees, or in the name of the recipients of the assets of the bank, whatever that name may be. The right to sustain suits in that mode, can be firmly placed upon the principle of assignment.

At any time before the dissolution of a corporation, it may make an assignment of all its effects. 2 Kent, 315; 7 Gill & Johns. 448. The assignee is then clothed with all the powers

Digitized by Google

of the assignor. The transfer, under statutes of this description, is an assignment by operation of law. Executors and administrators are assignees in law. 1 Lomax Ex'rs. 287; 1 Williams's Ex'rs. 510. The interest acquired under an attachment, or garnishment, is upon the principle of assignment. 1 How. 48. Every judgment, execution and sale thereon operate only a legal assignment of the interest of the defendant. So in regard to bankrupt and insolvent laws. Upon a certain state of facts, a decree is rendered, or judgment pronounced, an assignee is appointed, to whom, by mere operation of law, the whole estate of the debtor is transferred. The assignee thenceforth stands in the place of the debtor, as to the collection and disbursement of the assets. Various other illustrations of the principle might be adduced. So when, under this law, the charter is declared forfeited, trustees are appointed, to whom the effects of the bank which is dissolved, pass as by assignment. This is the principle on which the case already cited from 6 Missouri R. stands; and the principle upon which the legislation on this subject may rest with safety. The practice of judicial assignments seems to be coeval with the common law, and to rest upon a basis not to be shaken.

The statute of Wisconsin provides that when the charter of any bank shall be annulled, the court may appoint receivers or trustees to take charge of the assets, and to prosecute or defend suits in the name of such corporation, *or otherwise*. Stat. Wis. 147. That is, may sue in their own name, or that of the corporation.

In Missouri the officers of the bank, at the time of its dissolution, are to be trustees to settle, &c., with power to sue in the names of the trustees of such corporation, describing it by its corporate name. Miss. Rev. St. 236. In Indiana the state is made the trustee, and all demands may be prosecuted in the name of the state, or its assignee. Ind. Rev. St. 149. This act was passed after the decision of *The State Bank* v. *The State*, 1 Blackford, and did what the court decided had not previously been done.

In New York there are two modes of proceeding against cor-

Digitized by Google

porations; one in the chancery court, by which their powers are suspended, when abused. 2 Rev. St. 462. The other in a court of law, by which, upon the dissolution of a corporation, the directors or managers, existing at the time, are declared to be trustees for the creditors and stockholders, with power to settle the concerns of the corporation. 1 Ibid. 600. See 2 Kent, 304, 307.

In North Carolina the statute provides that the court rendering the judgment that a corporation has forfeited its charter, or has been dissolved by surrender or otherwise, shall appoint a receiver who shall have full power to collect, *in his name*, all debts due to the corporation. It makes no provision for continued existence. In the case of *Fox* v. *Horah*, 1 Ired. Eq. R. Judge Gaston inserts this statute in his opinion, and comments upon it, in terms of marked approbation. Not the slightest intimation escapes from him that it is unconstitutional; it is evident he thought it was not.

The case of *Folger* v. *Chase*, 18 Pick. *does not* decide that the continued existence of the corporation is necessary to prevent the extinction of the debts. It only says, that the statute of Massachusetts, which gives continued existence for three years to a charter which would otherwise expire by express limitation, or in any other mode, "is a just and wise remedial law, and ought to be liberally construed, because it guards against the inequitable consequences of the common law, in regard to the civil death of a corporation."

In New Jersey a charter was granted by the legislature to the Protection and Lombard Bank, containing a clause that the legislature might alter, amend, or repeal the charter. The charter was repealed, and certain persons constituted trustees, with authority to institute suits in their own names, as trustees of the creditors and stockholders, for all debts, &c. There was also a general statute, providing that on the dissolution of a corporation, the directors then in office should be trustees for the stockholders and creditors, and that all the property and rights of the corporation should be transferred to the trustees. It was insisted, notwithstanding these provisions, in a suit

Digitized by Google

brought by the trustees in New York, that the debts due to the corporation were extinguished. The suit was in the name of the trustees. The court sustained the law, saying, "there never was an instant of time, when the debtors of the bank were released from their obligation." *M'Laren* v. *Pennington*, 1 Paige, 110. This is to the point.

Aside from authority, let us look at this point upon principle, in another aspect. It is the better doctrine, that it is not the mere judgment of ouster or of forfeiture, which works dissolution, any more than sentence of death executes a criminal. There must be execution executed. Willc. 186; Ang. & Ames, 644; 1 Blackf. R. 278; 4 Cowen R. 122, n.; 1 Spear S. C. Rep. 449. The appointment of trustees is intended by the statute to be a part of the judgment, or to be made at the same instant with it. By the judgment, or simultaneously with it, the assets pass to the trustees, in trust for the creditors and stockholders in virtue of the assignment. When the judgment afterwards is carried into effect by a seizure of the franchises, the debts due the bank have already been passed beyond the reach of the consequences of a dissolution, and no extinguishment takes place, even if all contended for in argument be granted. So odious are the common law consequences of forfeiture of charter, that it is said by an eminent judge, "that no judgment of forfeiture has ever been entered up, and acted on by the courts." *State* v. *Bank*, 1 Spear S. C. Rep. 449. This was the fact in regard to the city of London, and the practice seems to be uniform. Willc. on Cor. 186. Until the execution of the judgment, therefore, there was no extinction of the debts, and they passed by the legal assignment to the trustees, upon the premises assumed in argument.

In Maryland the court which declares the forfeiture is authorized to appoint commissioners, "who may recover any debt due to the bank in a suit to be instituted in the corporate name." 1 Dorsey, 695. It does not say the debts to or from it shall not be released, nor does it provide for a continued existence. This statute has been repeatedly acted on by their courts. When it is said in regard to this act that it does not direct the franchises

Digitized by Google

to be seized, it may be replied that the statute of this state does not either. And when it is said further, "that the judgment under it amounts to a mere ouster of the corporators, and continues the corporation in the commissioners," the reply is, if that be its scope and object, it is wholly unconstitutional according to the settled construction of that instrument, unless the corporators assent to it, for which no provision is made. But we do not think that is a legitimate deduction from the statute, because it expressly speaks of a judgment of forfeiture of charter. The distinction between a judgment of ouster and of forfeiture is, that the former is against individuals who usurp a franchise or intrude into an office, the latter is against the corporation itself. The former is rendered upon a proceeding against the individuals who thus act, the latter upon proceedings against the corporation. The statute directs proceedings only against the corporation, not against individual corporators. The statute itself denominates it a judgment of forfeiture, and I see no reason to change its designation, especially as it does not authorize a judgment of ouster.

The statutes of Massachusetts, Maine, Michigan, Vermont, Wisconsin and others are almost identical in their terms. They provide that corporations, when their charters expire, or shall be annulled by forfeiture or *otherwise*, shall be continued bodies corporate for three years from such time for closing their concerns. And that the court, upon application of any creditor or stockholder may appoint receivers for that purpose with power to prosecute or defend suits in the corporate name or *otherwise*, as if such corporation were in being. One or two of them omit the word *otherwise*, in the last clause.

This statute, or a very similar one, was passed in Massachusetts as early as 1812, and it seems to have been the parent of those in the states just named. The supreme court of that state had it under consideration in *Crease* v. *Babcock*, 23 Pick. 346. They say "that when the charter is repealed" (or has been annulled) "it has ceased to have force as a charter. It has expired. This is its dissolution. The corporation derives no power from it. It cannot carry on business. It exists by

Digitized by Google

virtue of the 7th section, and that gives it force only for certain definite, specific and limited purposes. This qualified prolongation of the existence of the corporate body is in the nature of an administration of its estate. All rights under the defunct corporation were fixed at its dissolution. But it has a nominal existence, for the purpose of closing its concerns in the most convenient manner, and especially of compelling it to execute its contracts and discharge its obligations and liabilities." So entirely was the corporation in that case considered at an end, that a remedy was afforded against the individual stockholders, in pursuance of the statutes. This law contemplates the consequences of dissolution in two aspects. If the officers of the bank will carry out its provisions virtually as its administrators, they are permitted to do so; if they do not, the court, upon application, may appoint receivers for the purpose. These may prosecute or defend suits in the corporate name or *otherwise*. How otherwise but in their own name? This shows very clearly that in the opinion of these legislatures, either mode is legal.

The statute of Massachusetts provides that the court may at any time within three years after the expiration or forfeiture of the charter, upon application, appoint receivers, and may extend their *powers beyond three years*, if deemed necessary. This shows the legislature knew that the bank, might refuse to accept this prolonged existence, and might refuse to carry out the provisions of the law; to guard against that contingency, power is given to the courts to appoint others, who would carry the law into effect. Mass. Rev. Laws, 364.

The case of *Foster* v. *Essex Bank*, 16 Mass. R. decides this law to be constitutional in all its parts, as well the compulsory as the voluntary clause. The case of *Crease* v. *Babcock*, above cited, proves that the bank is, in the eye of the law, *dissolved* when the charter expires, or is judicially determined to be forfeited. That the continuance of the corporate powers is the mere administration of its assets, and that the *administrators* act not as a corporation, but as the assignees of its effects. A court may be entrusted with power to grant longer time to administrators to settle their accounts and wind up an estate; but

Digitized by Google

it would not be thought that it could constitutionally exercise authority to create or continue a grant of corporate powers. That belongs to the legislature alone.

These cases hold the law as it stands to be constitutional. The bank may continue to act under the statute to wind up its affairs, but if its officers will not do so, then receivers may be appointed who will. They show that either mode is lawful, not that one is, and the other is not.

A change of charter is a mere proposition to change, until accepted. *Maryland* v. *Baltimore and Ohio Railroad Co.* 12 Gill & Johns. 399.

The Ohio statute directs that after judgment of forfeiture, the charter of said bank shall be a dead letter to all intents and purposes upon dissolution, as if the same had never been granted; but that the commissioners shall be invested with all the powers of the bank, and shall have power to sue and recover in the name of said bank for the use of the creditors. Ohio Rev. Stat. 132. This statute has been repeatedly enforced in their courts. It has been there decided that the corporation "cannot prosecute a suit after its dissolution, the right exists in the receivers and nowhere else. None but the receivers can sue in the corporate name. When they use that name as a party plaintiff, they must set forth sufficient to show the character in which they appear." 13 Ohio, 270. That is, they must show the suit is for their use.

In another case they say, "to give jurisdiction it is necessary to bring before the court as a party, the trustees or other persons named in the statute, having the legal charge of the assets of the dissolved corporation. Without this there can be no proceeding. A writ directed to a defunct corporation is a nullity." *Renick* v. *Bank West Union*, 13 Ohio, 299. All this shows very plainly that in the opinion of that court, there was no continued existence of the corporation, and no necessity for it to carry out the purposes of the statute. The name alone remained.

When the right to sue is by the statute vested or continued in the corporate name, to be exercised by the trustees, it may rest upon the principle of assignment, as well as when the right of

Digitized by Google

suit is given to the trustees. In the one instance the legal right passes by the operation of law, in the other only the equitable right. In the one the trustees have the right to sue in their own name, in the other by virtue of the equitable assignment and the express provision of the statute, they have right to use the corporate name. And there is in this nothing more anomalous than in the use of John Doe, a mere non-entity, to recover in actions of ejectment, or of the name of a dead man to continue the prosecution of a suit brought for the use of a third person. In confirmation of this view, that these proceedings are in the nature of assignments, it may be stated that the practice in New York is to require the bank to make an assignment to the receivers, just as under some insolvent laws an assignment by the debtor is required; under others the assignment is effected by operation of law.

But it is said, if the corporation be not continued there is a point of time, and it matters not how small, between the judgment of forfeiture, which is the moment of dissolution, and the transmission of the assets to the trustees, and in that brief space the whole debts are extinguished, and cannot be revived. We will meet this fairly. This position assumes that the judgment of its own force, and without execution operates a dissolution. I have endeavored to show that the authorities do not sustain this position, but I will now treat it as granted. The judgment of forfeiture and the appointment of trustees are intended to be as nearly concurrent as possible. They are parts of the same transaction. Separate instruments are frequently connected together and made to operate as one. A deed to a husband, and a mortgage of the same estate to secure the purchase-money are regarded but as one instrument and defeat the wife's claim to dower. In law fractions of a day are not usually regarded. The minutes of judgments and orders in the circuit courts are directed to be drawn up each day, by the clerk, to be read in open court, to be corrected when necessary, and then to be signed by the judge. A judgment cannot be considered as perfected until this is done, and if the proper entry is made, what the argument assumes to be done at separate intervals, in fact receives its effica-

Digitized by Google

cy at one and the same instant. The lien of the judgment is by statute in this state directed to be from the time of entering such judgment; yet judgments entered on the same day are regarded as in all respects equal.

On authority the case of *McLaren* v. *Pennington*, 1 Paige R., already cited, has been shown to be against it. So is *Crease* v. *Babcock*, 23 Pick. 346. *Mumma* v. *Potomac Company*, 8 Peters, is also against it. There the charter of the old company had to be surrendered, and the surrender accepted before the new charter could take effect. Here was a brief interval; and the most minute, imaginable subdivision of time, it is said, will work the extinguishment. Yet there it was held, the obligation survived. But the case of the *Atlas Bank* v. *Nahant Bank*, 23 Pick. 480, establishes a principle which removes all doubt on this subject. It arose under the statute of Massachusetts in regard to corporations, which contains provisions very similar to ours. The injunction clause of that act, and the sixth section of our act, are in effect the same. In that case it was held, "that the sequestration made by force of the statute, took effect not merely from the time of the appointment of receivers, but from the issuing of the injunction." The necessary result of this is, that as soon as the receivers are appointed, they have a right to all the *demands* of the bank from the time of issuing the injunction, and it excludes all consideration of this *punctum temporis*, a point of time. This is in analogy to proceedings upon attachment and garnishment, which are but legal modes of assignment, and which, according to the settled law of this state, bind the estate from the time of their service. Indeed the constitutionality of this sixth section, can only be sustained, as I think, upon the ground that it does preserve the fund for the creditors, from the time of the issuing of the injunction.

If the principle be correct, that the trustees take as assignees under the appointment, it will scarcely be doubted, that there is that sort of privity between them and the bank debtors which will enable them to recover.

The variety of the statutory provisions in the several states on this subject, proves that their substance and effect have been

Digitized by Google

looked to, more than mere form. Neither the research of counsel, nor the investigation of the court, has brought to light a single case in which any one of such laws has been held to be unconstitutional. The case of *Fox* v. *Horah*, 1 Ired. Equity, only decided that, the case before the court did not come within their statute. The court commended the statute as wise and just, and calculated to exert a salutary influence. The case of *The Bank* v. *The State*, 1 Black., only held that the provisions attempted by the legislature, were too imperfect and incomplete to effect the object. What these provisions were, is not shown in the report of the case, nor have I been able to find the act among the laws of that state. It seems only to have been a special act. The decision was made in 1823. The legislature at its next session passed a law, in principle like ours, transferring the assets to the state as a trustee, and authorizing suits in the name of the state or its assignee; and their books of reports, so far as I have been able to trace, exhibit no further complaint or ojection to the law. The case in 2 Harrington, 8, arose under a special act of Delaware, passed two years after the charter of the Commercial Bank had expired, "reviving the said bank with all its former powers, rights and privileges." It was decided, that it was not the intention of the legislature to revive the debts due to or from it; and the court, with a good deal of parade, go on to say, that if such had been the intention of the law, it would have been unconstitutional. Neither of these positions has any direct bearing on the case before this court. The case holds that a corporation once dissolved, cannot, by a subsequent special law, be revived so as to revive the debts due to it; or rather it shows that would have been the decision, if the law had embraced the facts. On this point it stands directly opposed to the case already cited from 17 Serg. & Rawle, 65, and the doctrine laid down by Angell & Ames, 668, that, "if a corporation be revived, all its rights and responsibilities are of course revived with it." But it matters not now with us, which of these cases is right, because if this opinion establishes or proves anything, it is that before the dissolution of this bank, or at farthest simultaneously with it, the assets passed to the trus-

Digitized by Google

tees. In support of these or similar provisions, are direct adjudications in some of the state courts, and the coöperation of the courts in all, where any question has arisen under them.

The policy of this state has been very clearly indicated. The constitution provides, "that no conviction for any offence shall work a forfeiture of estate." Corporations may not be comprehended in this benign provision, yet it shows the spirit in which our government was framed. A series of acts, public and private, for years before the enactment of this law of 1843, and extending also to a subsequent period, demonstrates the policy of the state on this subject. The policy, the feeling, and the intention of the legislature upon this subject, cannot be mistaken. It is a settled rule of construction, that the courts are to carry out the intention, and give effect to the policy of the legislature, if there be no constitutional obstacle, or controlling influence to prevent it. 1 Kent, 463. I can see nothing of that kind in reference to the sections of this statute now under consideration, and I conclude, in the language of the supreme court of Massachusetts, (18 Pick. 66,) that "this is a just and wise remedial law, the object of which is to guard against the inequitable consequences of the common law rule, and ought to be liberally expounded."

The re-argument is refused.

Mr. Chief Justice SHARKEY concurred.

Mr. Justice THACHER delivered the following opinion on the petition for re-argument:

The subject matter of this controversy was fully stated in the opinion heretofore delivered by me on the first argument of this cause. For the reasons in that opinion stated, I felt it my duty to dissent from the judgment of the majority of the court in granting the motion of the trustees of the Port Gibson Bank, to be made parties to this suit, and for leave to defend the same. The important consequences which must necessarily flow from any decision made in this cause have induced me to re-examine with more than ordinary care, all the authorities relied upon by either party to sustain their respective positions.

Digitized by Google

In all the discussion which this cause has elicted, it has never been controverted that the judgment rendered by the circuit court against the Bank of Port Gibson was that of a total forfeiture of all the franchises granted to the bank by its charter. The consequences which result from this judgment, under the statute of 1843, is the only matter in dispute. In the judgment heretofore rendered in this cause, it was decided that the common law consequences of such a judgment would have been to extinguish all debts due to the bank previous to its dissolution, but that, by virtue of the statute of 1843, such debts survived the dissolution of the corporation.

I will now proceed to examine the authorities relied on to sustain this view of the statute.

The great and leading case is that of *Mumma* v. *The Potomac Company*, 8 Peters R. 281. The first section of the charter of the Chesapeake and Ohio Canal Company, incorporated by the legislature of Virginia, provides that "so soon as the legislatures of Maryland and Pennsylvania, and the congress of the United States shall assent to the provisions of this act, and the Potomac Company shall have signified their assent to the same by their corporate act, a copy whereof shall be delivered to the executives of the several states aforesaid, and to the secretary of the treasury of the United States, there shall be appointed by the said executives and the president of the United States, three commissioners on the part of each state and the government of the United States," whose duty it was made to open books of subscription for the capital stock of the company. The capital stock was six millions of dollars, divided into sixty thousand shares of one hundred dollars each. By the second section of the charter, it was provided that subscriptions for stock "may be paid and discharged either in the legal currency of the United States, or in the certificates of stock in the present Potomac Company at the par or nominal value thereof, or in the claims of the creditors of the said company, certified by the acting president and directors to have been due for principal and interest on the day on which the assent of said company shall have been signified by their corporate act as herein-

Digitized by Google

before required." By the thirteenth section of the same act, it is provided, "that whenever the Potomac Company shall have declared its assent to the provisions of this act, in the manner herein before required, it shall be lawful for the said company to surrender its charter, and convey in due form of law to the Chesapeake and Ohio Canal Company, hereby incorporated, all the property, rights and privileges by them owned, possessed and enjoyed under the same; and thereupon it shall be lawful to and for the said company, hereby proposed to be created, to accept such surrender and transfer, and to hold, possess, use and occupy all the said property, rights and privileges, in the same manner, and to the same effect as the said Potomac Company now hold, possess, and occupy the same by law; and *thereupon* the charter of the said Potomac Company shall be, and the same is hereby vacated and annulled, and all the rights and powers thereby granted to the Potomac Company, shall be vested in the company hereby incorporated." By the twelfth section it was provided, "that it shall be the duty of the president and directors of the Chesapeake and Ohio Canal Company so long as there shall be and remain any *creditor* of the Potomac Company, who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company, to pay to such creditor or creditors annually, such dividend or proportion of the net amount of the revenues of the Potomac Company, on an average of the last five years preceding the organization of the said proposed company, as the demand of the said creditor or creditors at this time may bear to the whole debt of one hundred and seventy-five thousand eight hundred dollars."

From these provisions, it will be seen that the act chartering the Chesapeake and Ohio Canal Company, was not intended as an absolute law, but was a mere proposition to the parties therein named to become operative upon their joint acceptance of the same. The pleadings in the cause state that the legislatures of Pennsylvania and Maryland, the congress of the United States and the Potomac Company, all accepted the terms of this charter, and the latter, by deed in due form of law, con-

Digitized by Google

veyed all its property, rights, credits and previleges to the Chesapeake and Ohio Canal Company, which latter company accepted said conveyance and took possession of the property thereby conveyed.

This case has been strenuously relied on as sustaining the general principle that the debts due to a dissolved corporation survive such dissolution. I have been thus careful in the statement of the contents of the charter, in order to show that the dissolution of the Potomac Company could not and did not take place either by judicial forfeiture, nor by the expiration of its charter, but that the whole transaction was a matter of mutual contract and agreement by the parties thereto, which contracts and agreements were executed as conditions precedent to a voluntary surrender of its charter by the Potomac Company; and the reason why the obligations of that company survived its dissolution may be found in the fact that statutory provisions had been previously made and accepted, whereby the property of the Potomac Company was held responsible in the hands of the Chesapeake and Ohio Canal Company for the debts of the Potomac Company, according to the terms herein before set forth. The common law consequences of a dissolution were avoided by a voluntary assignment made by the Potomac Company of its assets for the benefit of its creditors, previous to its dissolution. By the very terms of the statute of Virginia, the dissolution of the Potomac Company could not take place until, by its corporate act, it had transferred "all the property, rights and privileges by it owned, possessed and enjoyed," under its charter.

The case decides nothing more than that a corporation, previous to its dissolution, may make an assignment for the benefit of its creditors, and that after such assignment and subsequent dissolution, the creditors cannot maintain suit against the corporation so dissolved, although they have and can prosecute their lien created by virtue of the assignment upon the property assigned. The same principle was decided in the case of *Lennox* v. *Roberts*, 3 Wheat. 375, wherein an assignment in trust of its property was made by the Bank of the United States, a

Digitized by Google

short time previous to the expiration of its charter. The two cases are precisely similar in legal effect. The cases of *The State of Maryland* v. *The Bank of Maryland*, 6 Gill & Johns. 205; *Pickstick* v. *Lister*, 3 Maule & Selw. 371; *Goss* v. *Neal*, 5 Moore's R. 19; *Rex* v. *Watson*, 3 Price R. 6; *Brewer* v. *Pitkin*, 11 Pick. 829; *Phenix* v. *Ingraham*, 5 Johns. 112; *Marbury* v. *Brooks*, 7 Wheat. 565; and *Robins et al.* v. *Embry*, S. & M. Ch. R. 207, all sustain this principle, and I know of no case holding a contrary doctrine.

The case of *Bleakney* v. *The Farmers and Mechanics Bank of Greencastle*, 17 Serg. & Rawle, 65, has been relied on to show that the debts due to a corporation survive its dissolution. Upon an examination of this case it will be found that the charter of the Farmers and Mechanics Bank contained a provision that the bank should pay to the state six per cent. of its dividends, and that an omission or neglect to do so, should be a cause of forfeiture of its charter. In November, 1819, the bank made a dividend without paying the six per cent. on the same to the state, but no proceeding was instituted by the state to judicially ascertain the forfeiture, but, on the contrary, the state waived its right to the forfeiture by an act of assembly passed April 1st, 1822, entitled, an act for closing the concerns of banking institutions. Laws of Penn. 1822. On the 20th day of January, 1820, being two months after the failure of the bank to pay the state the six per cent. on the dividend of November, 1819, Bleakney made a note in favor of the bank for $1160, payable sixty days after date. On this note, on the 19th day of November, 1825, the bank brought suit against Bleakney. The latter insisted that the failure of the bank to pay six per cent. on the dividend of November, 1819, to the state, worked a dissolution of the charter, and that every note taken by the bank, after the first Monday of January, 1820, was therefore null and void. The court held that the bank could recover on the note. The pleadings in this case admit that the failure to pay the state the six per cent. on the dividend of November, 1819, was a cause of forfeiture; but that cause of forfeiture had not been judicially ascertained. The state did not prose-

Digitized by Google

cute the bank for the cause of forfeiture, but, on the contrary, passed a law by which she waived her right of forfeiture. The bank therefore stood as if it had committed no act of forfeiture. It was therefore not true in law, as insisted by Bleakney, that the bank had forfeited its charter, the same not having been dissolved. The doctrine is well established that a corporation is not to be deemed dissolved by reason of any misuser or non-user of its franchises, until the fault has been judicially ascertained and declared, even if the charter declare that in default of fulfilling the conditions, the corporation shall be dissolved. Hence such a defence could not be set up to an action of assumpsit upon a promissory note. *Peter* v. *Kendall*, 6 B. & C. 703; *Slee* v. *Bloom*, 5 Johns. Ch. R. 379; *Wild* v. *Jenkins*, 4 Paige C. R. 481; *King* v. *Amery*, 2 T. R. 515; 9 Wend. 382; 8 Ibid. 645; 6 Cowen, 26; 9 Cranch, 51; 4 Wheat. 698; 4 Mod. R. 53; 4 Gill & Johns. 121; 10 Ibid. 346; 1 Dev. & Batt. 306; 8 Greenleaf, 372; 24 Pick. 52; Angell & Ames on Corp. 129, 667; 2 Kent, 312.

The result of this case is, that if a corporation commit an act which is a cause of forfeiture, and the legislature subsequently waives its right of forfeiture, a debtor cannot set up such cause of forfeiture in defence of an action afterwards brought by the corporation. No dissolution of the corporation having taken place, the effect of a dissolution upon the debts due a dissolved corporation was not before the court, and no decision was made upon that point.

In the case of *Lindell* v. *Benton & Kennerly*, 6 Missouri R. 361, Lindell had obtained a judgment against the Bank of Missouri, on which *fieri facias* issued, and was returned, no property found; whereupon Lindell issued a garnishment on the 18th day of July, 1837, against Thomas H. Benton and George H. Kennerly, as garnishees, to answer such interrogatories as might be exhibited against them by the plaintiff touching their indebtedness to the Bank of Missouri. The right to this garnishment was granted by a statute of the state, the tenth section of which provides, that "from the time of making service of such garnishment, all moneys and effects due and owing,

Digitized by Google

payable or belonging to such corporation, shall be bound until the judgment against the corporation is satisfied." Digest of 1835, p. 126. The charter of the bank expired by limitation on the 1st day of February, 1838. The writ of garnishment was issued and served on the 18th day of July, 1837, being seven months previous to the expiration of the charter. During this seven months, the amount owed by Benton and Kennerly to the bank had been vested by operation of the statute in Lindell, who was the judgment creditor of the bank, and the garnisher of Benton and Kennerly, who were the debtors of the bank. Benton and Kennerly delayed answering the garnishment until after the 1st day of February, 1838, on which day the charter of the bank expired by limitation, and then moved the court to discharge the garnishees, because, at the date of said motion, there was no such corporation as the Bank of Missouri, and for other causes. The court overruled the motion, on the ground that the garnishment was not a suit between the bank and the garnishees, the interest of the bank having been vested by operation of the statute previous to the expiration of its charter, in Lindell, the plaintiff in the garnishment.

The case of *Hubbard et al* v. *The Hamilton Bank*, 7 Metc. R. 340, decides, that "an attachment of the property of a bank, made before the bank commissioners applied for an injunction under the statute of Massachusetts, 1838, ch. 14, § 5, to restrain the bank from further proceedings with its business, was not dissolved by the subsequent appointment of receivers, pursuant to the provisions of that statute, to take possession of the property and effects of the bank." The same principle has been decided in this state, in *Oldham* v. *Ledbetter*, 1 How. 43.

The two foregoing cases are both cases of judicial assignments of property and credits belonging to banks, which assignments took place previous to the dissolution of the corporations. Besides, they are cases of proceedings *in rem*, and in the case of *Lindell* v. *Benton & Kennerly* the bank was not a party to the garnishment; and the case of *Hubbard et al.* v. *The Hamilton Bank*, proceeded upon the ground that a lien was acquired by virtue of the attachment against the property

Digitized by Google

of the bank, which lien was not raised by the transfer of the assets of the bank into the hands of the receivers. The effect of a dissolution of a corporation, whose property, rights, and credits had not been assigned or lawfully disposed of previous to such dissolution, is not embraced or adjudicated in either of these cases.

This concludes a review of the cases which have been relied on to show that the debts due a corporation survive its dissolution. The case of *The Lincoln and Kennebec Bank* v. *Richardson*, 1 Greenl. Me. R. 79, I will presently examine in a different connection. In the case of *Mumma* v. *The Potomac Company*, there was a voluntary assignment for the benefit of the creditors, before dissolution of the corporation. In the case of *Bleakney* v. *The Farmers and Mechanics Bank*, no dissolution occurred. In the cases of *Lindell* v. *Benton & Kennerly*, and *Hubbard et al.* v. *The Hamilton Bank*, the plaintiffs had obtained liens upon the property of the banks, previous to dissolution or process against them, and the dissolution or process did not therefore raise the liens.

In the opinion which I delivered on the former argument of this cause, I assumed the position that in order to enable the trustees appointed to take possession of the assets of the Bank of Port Gibson, and to collect the debts due the same, it must appear, from the statute that the legislature had directed only a partial seizure of the franchises of the bank, that the privileges of holding property, suing and being sued, and of collecting and paying debts, were not to be seized into the hands of the state, but to be continued in the trustees directed to be appointed; and that if those franchises, as well as the rest, were directed to become extinguished by the judgment of forfeiture against the corporation, it produced a total extinguishment of all the debts due to and from the bank, so that neither the franchises of the bank, nor the power to enforce its obligations, could be revived by legislative enactment, or the interposition of a court of law or equity.

On the re-hearing it has been replied, that the legislature has no power to direct, in cases of forfeiture, the seizure of a por-

Digitized by Google

tion of the franchises, and to continue the remainder, either in the corporation, or in other hands, for the purpose of settling the affairs of the corporation, unless the corporation signify its assent to such act of the legislature. In support of this position, the cases of *Foster et al.* v. *The Essex Bank*, 16 Mass. R. 244; *The Lincoln and Kennebec Bank* v. *Richardson*, 1 Greenl. Me. R. 79, and the case of *Crease* v. *Babcock*, 23 Pick. R. 334, are relied upon mainly.

In the case of *Foster et al.* v. *The Essex Bank*, it appears that the Essex Bank was incorporated to continue from the 1st day of July, 1799, until the expiration of twenty years next following. Previously to the expiration of the charter, and upon the 19th day of June, 1819, a general law was passed, "that all bodies corporate and politic, which now are, or hereafter may be established, and whose powers would expire, either by express limitation in their charters of incorporation, or otherwise, shall be, and they hereby are continued bodies corporate and politic, for the term of three years, from and after the day on which their powers would expire as aforesaid, for the purpose of prosecuting and defending all suits, which now are, or may hereafter be instituted, and of enabling such bodies corporate and politic gradually to settle and close their concerns, and divide their capital stock; but not for the purpose of continuing the business for which such bodies corporate and politic have been or may be established." In April, 1819, being more than two months before the original charter expired, Foster brought suit against the Essex Bank for $50,000. Between this time and the next term of the court, the original charter expired by limitation, but previously to such expiration, the statute, above quoted, continuing all corporations for three years from the period when their dissolution would otherwise occur, had become a law. At a subsequent term of the court, in March, 1820, the counsel for the bank made the following suggestion:

"And now, William Prescott and Leverett Saltonstall, who were originally retained in this action by the directors of the Essex Bank, suggest that, since the last term of this court, the

Digitized by Google

corporation of the President, Directors and Company of the Essex Bank is dissolved by the expiration of the time limited for its duration, in the act of incorporation: which said act is dated the 18th day of June, A. D. 1799.

WILLIAM PRESCOTT,
LEVERETT SALTONSTALL."

In the argument of this suggestion, the counsel for the bank insisted that the statute continuing the charter of the bank for three years beyond the period of its limitation by charter was unconstitutional and inoperative, unless the said statute was accepted by the bank, which had not been done. Messrs. Pickering and Daniel Webster, as counsel for Foster, contended that the law was constitutional, and must be enforced, regardless of the acceptance or non acceptance of the bank. Chief Justice Parker, in delivering the opinion of the court, sums up his argument in the following language: "Upon the whole, we cannot discern any principle by which it can be decided that this statute is void. It is not retrospective in the proper sense of that term; for it provides for a future existence of the corporation, for limited and specific purposes. It does not infringe or interfere with any of the privileges secured by the charter, unless it be considered a privilege to be secured from the payment of debts, or the performance of contracts; and this is a kind of privilege which we imagine the constitution was not intended to protect. It does not impair the force or obligation of contracts, but, on the contrary, provides a way of enforcing them, both in favor of, and against the corporation. . . . . It was the incumbent duty of the legislature, to provide that corporations should not avoid their obligations by ceasing to exist, and the mode adopted in the act in question was certainly the most favorable. Had they provided that all corporations should cease to transact business three years before the time for which they were created expired, in order that they might bring their affairs to a close, it might justly be said that their privileges were taken away, and the grant of the government was impaired. But to provide for their continuance for such purpose, three years beyond their term, is no breach of

Digitized by Google

their privileges; and is, in fact, nothing more than establishing a mode by which their business may be closed, and their contracts carried into execution. It is in the nature of an administration upon their estate, and is only doing, in a more convenient form, what a court of equity, with competent powers, might do, viz. making the common fund answerable for the debts which were created on the credit of that fund. The suggestion filed in the case cannot have the effect to impede the progress of the suit."

The sole question at issue in this case, was the power of the legislature to continue a portion of the franchises of the bank for a period beyond the limit of its original charter, without the consent of the bank, for the purpose of collecting its assets, and paying its debts. The court decide that "it was incompetent for such corporation to deny its existence, against a statute of the government, the object of which is to give a right of action on contracts, upon which they were legally and morally bound under their charter." The reason of this rule is based upon the equity principle, that the capital stock of a bank is pledged for the payment of its debts, and if the stockholders divide this capital stock, leaving the debts of the bank unpaid, such division is fraudulent, and the funds divided become a trust fund in the hands of the stockholders for the benefit of creditors.

In the case of *The Lincoln and Kennebec Bank* v. *Richardson*, the court commenced their opinion by saying: "This case comes before us upon an agreed statement of facts, and was submitted without argument, on the ground that all the general reasoning in relation to the subject had been gone into in the case of *Foster et al.* v. *The Essex Bank*, which cause has recently been decided by the supreme judicial court of Massachusetts, and we are now merely called upon to decide whether the difference between the two cases as to some of the facts will vary the principles of law by which the case must be determined. There are only two points in which the cases differ. In the case before us, a bank is plaintiff; in the other, a bank was defendant; and in the present case, the act of June

Digitized by Google

1st, 1812, continuing the powers of this and other banks until the first Monday of October, 1816; and the second act for continuing or reviving the powers of banks, did not pass till December 14, 1816, more than two months *after* the first extending act had ceased to operate; whereas, in the other case, the extending act was passed some weeks *before* the expiration of the charter of the Essex Bank. We have examined the opinion of the court in the latter case, and are perfectly satisfied with their reasoning and conclusion, and we are of opinion that the same reasoning ought to govern both cases."

After thus yielding their full assent to the opinion of the court in the case of *Foster et al.* v. *The Essex Bank*, they proceed to state the following apprehension: — "We *apprehend* that the same principle of law applies to an act continuing a charter beyond its original term, as to the act which granted the charter; that is, in both cases the grant or chartered powers must be *accepted;* because a charter, and the extension of it, are, till so accepted, inoperative; but *when accepted*, they become contracts. Nor do we perceive that, on this principle, it is of importance whether the extending act is passed *before* or *after* the expiration of the original charter. Acceptance is necessary in both cases." This apprehension is not sustained by the opinion of the court in the case of *Foster et al.* v. *The Essex Bank.* In that case the extending act was passed *before* the expiration of the charter, and there was no acceptance of the extending act by the bank; and the court there decide that the extending act was valid, notwithstanding its non-acceptance by the bank. The power of a legislature to revive a corporation, after the expiration of the original charter, was not decided in the case of *Foster et al.* v. *The Essex Bank;* and the dictum of the court, in the *Lincoln and Kennebec Bank* v. *Richardson*, that the legislature, subsequently to the dissolution of a corporation, can revive the same with the consent of the corporators, so as to compel the debtors of the dissolved corporation, without their consent, to pay the debts which were extinguished by the dissolution of the original corporation, is unsustaina-

Digitized by Google

ble by any authority which I have been able to find, but, on the contrary, is opposed by the following authorities:

"If a corporation have been actually dissolved and extinct, it can never be revived; the charter must create a new corporation by words implying incorporation." Wilc. on Corp. 185.

"When a corporation has completely ceased to exist, there is no ground for the theory of a continuance of the former corporation under a new name or capacity; it becomes altogether a new institution with newly created rights and privileges." 2 Kent, 309.

In the case of the *Commercial Bank* v. *Lockwood's Adm'r.* 2 Har. Del. R. 8, the charter of the Commercial Bank, like that of the Lincoln and Kennebec Bank, expired by limitation. Subsequently to this expiration, the legislature passed an act for the purpose of reviving the corporation with all its previous powers. The bank accepted the act by bringing suit on a note due by Lockwood to the bank previous to the expiration of its charter. In the course of the opinion in that case, the court say, "The Commercial Bank stood dissolved from and after the first day of March, 1830; the debt which is now sought to be recovered in this action became then extinguished. The legislative act of 1832, declaring the corporation to be revived and continued from the 1st day of March, 1830, with the same powers, privileges, rights, and immunities, which had been granted to it by its original charter, will not enable it to sustain a suit for the debt in controversy, inasmuch as the design of that act was, not like letters patent of the king, to which we have referred, to renovate and set in motion a dormant or disabled corporation, but to revive and renew, or rather to recreate a corporation that had been for months absolutely dissolved, and civilly dead; and by the well settled principles of law, this debt was extinguished on the day of the civil death of the corporation, and all indebtedness and obligation on the part of the defendant were then legally at an end, and the debt could not be recreated, except in the same way that the original debt had been created, that is, by mutual agreement."

A legislature has no power to revive a corporation actually

Digitized by Google

dissolved and extinct, whether the same occurs by limitation of charter or judicial forfeiture; but in cases where the use of the charter for some cause is merely suspended, the legislature may supply the defect, and thereby revive the corporation. *Colchester* v. *Seaber*, 3 Burr. 1866; Wilc. on Cor. 185; *Rex* v. *Passmore*, 3 T. R. 241, 242, 246; 2 Mason C. C. Rep., 44, 45, opinion of Judge Story; 1 Wharton R. 410.

Having shown that the dictum of the court in the case of the *Lincoln and Kennebec Bank*, that a charter of a bank may be revived after dissolution, is not sustained by authority, I will now present the main feature on which that case turned. After the passage of the act, which was supposed to have revived the dead corporation, the bank brought suit on a *stock note* against Richardson, who was a *stockholder* to the amount of the note. The court declared that the bringing of this suit was an acceptance by the bank of the act of revival, and they further say, in the conclusion of their opinion, "if it should be urged, as it has been, that there is no assent on the part of the debtors of the bank to the extension of the charter, and that the bringing of this suit, though it may be proof of acceptance on the part of the bank, is not so on the part of Richardson; it may be replied, in addition to what has been before observed, that it appears by the agreement of the parties that the note in suit is a *stock note*, and of course Richardson is a *stockholder*. He is then bound by the *act of acceptance* on the part of the directors, — the bringing of this suit. The stockholders are bound by their official acts, within the limits of their official duties." The case therefore shows that the act of revival was not only accepted by the bank, who was the plaintiff in the action, but also by the defendant, against whom the suit was brought. Had the suit been brought against a mere debtor to the dissolved corporation, who was not a stockholder, and who had not consented to the act of revival, there would then have been no foundation in law for the judgment of the court.

The case of *Crease* v. *Babcock et al.* shows that the Chelsea Bank was incorporated in April, 1836, subject to the provisions of a general law of Massachusetts, which provided that the

Digitized by Google

holders of stock in any bank at the time when its charter shall expire, shall be liable in their individual capacities for the payment and redemption of all bills which may have been issued by such bank, and which shall remain unpaid, in proportion to the stock they may respectively hold. Rev. Stat. Mass. 312, sec. 31. By the 40th section of the same law, it was further provided that "any committee, appointed by the legislature for the purpose, may examine into the doings of any bank chartered under the authority of this commonwealth, and shall have free access to all their books and vaults, and if upon such examination it shall appear, and after a hearing of said bank thereon, it shall be determined by the legislature that said bank has exceeded its powers or has failed to comply with any of the rules, restrictions and conditions provided by law, its charter may be declared forfeited." By the revised statutes of the same state, c. 44, sec. 7, it was also provided that all corporations, whose charters shall expire or be annulled by forfeiture or otherwise, shall be continued bodies corporate for certain purposes therein mentioned. The object of this section is to authorize them to collect their dues, to dispose of their property, to pay their debts, and to distribute their capital stock; but not transact any business other than what is necessary to settle and close their concerns.

Under these laws the Bank of Chelsea went into operation, and issued bills for circulation. On the 12th day of April, 1837, Crease presented for payment two bills of the bank for $1000 each. The bank refused to pay them. On the 20th day of April, 1837, the legislature, by virtue of the power reserved to it in such cases by the above statute, declared the charter of the bank dissolved. At the time of the dissolution, Babcock and others were stockholders of the bank. Crease then filed his bill against them, alleging the foregoing facts, and praying that the defendants might be decreed to pay the amount of the two bills held by him. The court decided that Crease was entitled to this remedy against the stockholders by virtue of the statute above quoted. Rev. Stat. Mass. 312, sec. 31. In giving its opinion in the cause, the court recognizes the continuance of the

Digitized by Google

corporation for certain limited purposes as the means by which the right to the remedy against the stockholders was preserved. The court say: "When the charter is repealed, it has ceased to have force as a charter. It has expired. This is dissolution. The corporation derives no power from it. It cannot carry on business. It exists by virtue of the 7th section (set forth above) and that gives it force only for certain definite, specific, and limited purposes. . . . . It has a nominal existence for the purpose of closing its concerns in the most convenient manner, and especially of compelling it to execute its contracts and discharge its obligations." In this case, then, the legislature had reserved the power to annul the charter of the bank by legislative repeal and to compel the stockholders to pay its debts, and all persons contracting with the bank, did so knowing such to be the law. The case proves two things; 1. That the continuance of the corporation in a qualified and limited form was essential for the purpose of preserving and collecting its assets, and compelling it to discharge its own obligations, and 2, that an acceptance on the part of the bank was not necessary for such continuance.

Another point made is, that the power given to the trustees of the dissolved corporation effects an assignment of the assets of the corporation, by force of the statute. An assignment is defined to be the setting over or transferring the interest a man hath in anything to another. If the statute of 1843 operates as an assignment, the questions arise, who made the assignment? by what authority was such an assignment made? and what estate does it convey? Previously to the dissolution, the state had no interest in the assets of the bank, and subsequently to it, her interest reached only to the personal property of the corporation. If the statute constitute an assignment, the assignment was made by the state. The interest of the state in the assets of the bank, after dissolution, consisted of the personal property owned by the corporation at the time of the dissolution. To this extent, the assignment may be good. The state having no interest in the *choses in action*, nor in the real estate, could make no assignment of either. This statute is not analogous to ju-

Digitized by Google

dicial assignments, for the reason that it creates no lien in favor of the trustees, on the assets of the bank previously to its dissolution. The legislature, having no interest in the property of the bank, before dissolution, could not create a lien upon it, either in its own favor or that of others. A lien cannot be created by legislative enactment, but must result from judicial proceedings under such enactment.

It is also insisted, that the appointment of trustees is a part of the judgment against the bank, and that thereby the title to the property of the bank is transmitted to the trustees without the intermission of a point of time.

I cannot concur in this view of the statute. The court can pronounce judgment upon nothing save the matters of law and of fact, arising upon the information and the pleadings thereon. The question of law and fact, is the guilt or innocence of the bank on the alleged charges of forfeiture. If the bank demur to any charge, as being no lawful cause of forfeiture, the court decides the matter of law arising on the demurrer. If the bank take issue, the jury find the verdict. And if either the judgment of the court or the verdict of the jury be against the bank, the court renders a judgment of forfeiture thereon. The trustees are not parties to the information. If judgment should be in favor of the corporation, they could not be appointed. The provision of the statute is, that "upon judgment of forfeiture," &c., "trustees shall be appointed," &c. Independent of any reasoning upon the subject, the statute itself shows that the trustees could not be appointed until *after* the judgment of forfeiture has been rendered; and, consequently, if the appointment was made any time before the judgment was entered up and made final, it was void for want of statutory authority. The appointment of trustees is not a judicial act. The court has no discretion to appoint or not to appoint, but is positively directed by the statute to make an appointment in the event of judgment of forfeiture. This is the performance of a mere ministerial duty.

It is also insisted, that after judgment of forfeiture, an execution must issue thereon for the seizure of the franchises, and be executed before a dissolution of the corporation can take place.

Digitized by Google

In the year-book of the 15th Edward IV. this rule is laid down: "That where it clearly appears to the court, that a liberty is usurped by wrong, and exercised on *no title*, either by the king's grant or otherwise, judgment only of *ouster* shall be entered. But that when it appears that the king or his ancestors have once granted a liberty, and the liberty is forfeited by misuser or nonuser, the judgment shall be, that it be seized into the king's hands." The reason given for the distinction is, that where the liberty or franchise has been usurped, the king cannot have that which never legally existed; but in case of an abuser or misuser of a franchise once lawfully granted, the king reserves that which originally flowed from his bounty, and this course, in the latter case, it has been said, is most beneficial for the subject, who, though by forfeiture, mispleading or default, he may lose his liberty, may have recourse to the king's mercy for restitution. 5 T. R. 551. When grants appear, but either the parties are incapable of taking, or their liberty or franchise granted is not allowable by law, the course has been to enter a mixed judgment, both of seizure and *ouster*. Sawyer's Arg. Quo. War. 17; Co. Ent. 537 – 539, a.; Roll. R. 113. The foregoing authorities relate to informations against persons to whom some liberty had been granted and misused, and to corporators when the object of the information is not to dissolve the corporation, but to punish the corporator for an abuse of liberties. A judgment of seizure cannot be proper when a corporation is dissolved. 4 Mod. R. 58. In the case of *Sir James Smith* v. *The City of London*, Sir James sued out a *mandamus* to be restored to his place as alderman of the city, subsequently to the judgment of seizure against the mayor and aldermen of London. In speaking of the original judgment against the mayor and aldermen of London, the court say, "By this judgment in the *quo warranto*, the corporation was not dissolved, for it doth neither extinguish or dissolve the body politic; but a corporation may be dissolved, for 'tis created upon a trust, and if that be broken 'tis forfeited; but a judgment of seizure cannot be proper in such a case, for if it be dissolved, for what purpose should it be seized?" 4 Mod. R. 58. After judgment, a writ of seizure is

Digitized by Google

sometimes issued to the sheriff, which commands him to seize the liberties into the hands of the king, but a writ of seizure only issues where there is properly a judgment of seizure, because the writ must necessarily follow the judgment. There is no rule of law better established, than that execution must follow the judgment.

These quotations from English authorities show that in cases of *quo warranto* there are four kinds of judgments, each depending upon the nature of the case presented by the information. If the information be against persons using a public franchise without color of title, the judgment is *ouster*, and no writ of seizure issues; if it be against persons having color of title, it is judgment of seizure, or judgment of *seizure* and *ouster;* if it be against the body politic or corporation itself, where there is no waiver of forfeiture, it is judgment of forfeiture, which produces a dissolution. 4 Mod. 58.

In the case of *The State* v. *The Bank of South Carolina*, 1 Spear's R. 449, the circuit court says, "It was said" (in argument at bar) "that no judgment of forfeiture has ever yet been entered up and acted on by the courts. It is certain that no such form of judgment can be found. This fact, however, admits of explanation, and does not justify the conclusion that there can be no judgment of forfeiture. As the king or state must necessarily be a party to an information to ascertain and enforce a forfeiture, both have the right to waive the breach of any express or implied condition contained in a charter, and, I suppose, for like reason, may forbear to enforce a judgment upon such information. Such was the fact in the case against the City of London. The consequences of a judgment of forfeiture at common law, amounted, in effect, to confiscation of the property of the corporation. If the corporation were dissolved, the land which had been granted to it, reverted to the grantor, and the debts due to and from the corporation, could not be collected. Under such circumstances, the state might well pause in enforcing such a judgment."

In *Turret* v. *Taylor*, 9 Cranch's R. 43–51, Mr. Justice Story said, "A private corporation, created by the legislature, may

Digitized by Google

lose its franchises by a misuser or a nonuser of them; and they may be resumed by the government under a judicial judgment, upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation." In the case of *The State* v. *The Bank of South Carolina*, above quoted, this authority is referred to and sanctioned, and the court further say, that "all the doctrine connected with corporations, was fully discussed and considered in the cases of *The King* v. *Amery*, 2 T. R. 515, and *The King* v. *Passmore*, 3 T. R. 199, and the judges seem to have taken it for granted, that corporations are liable to dissolution by judgment of forfeiture."

In the case at bar an information was filed against the Bank of Port Gibson, under the statute of 1843, which is entitled "An act to prescribe the mode of proceeding against incorporated banks for a violation of their corporate franchises, and against persons pretending to exercise corporate privileges under acts of incorporation, and for other purposes." By the first section of this act, it is made the duty of the district attorney to file an information when he shall have reason to believe that any incorporated bank, &c., within his district, has been guilty of a violation of any of the provisions of its charter, or has done or omitted to do any acts, the doing or omission of which would, in law, work a forfeiture of its charter. The eighth section of the same law provides for a "judgment of forfeiture against any bank or banks," found guilty under the information authorized by the first section. According to all the authorities, a judgment of forfeiture against the body politic or corporation, dissolves that corporation, and in case of dissolution, there being nothing to seize, a writ of seizure cannot be issued. Such a thing as issuing a writ of *dissolution* is unknown to the authorities.

The doctrine is well settled that if several privileges are granted in a charter, and there is a forfeiture of the charter for an abuser of one of the privileges, and a *quo warranto* is brought and judgment upon it, this is a forfeiture of the whole charter. *People* v. *The Bristol and Rensselaerville Turnpike Company*,

Digitized by Google

23 Wend. 238, 239. (Cowen's opinion, and authorities there cited.) It is equally well settled that such a forfeiture may be waived, in whole or in part, by the legislature. Many of the states of this Union have partially waived the rights of forfeiture against banks, by directing that the franchises of banking only be seized, and continue the corporation, with its remaining franchises, for the purpose of liquidation only. When such laws exist, the corporation is not dissolved, and the proper judgment would be seizure of the franchises forfeited. In such cases execution may issue, because, the corporation being continued, there is a defendant *in esse*, against which the execution can run; but where the forfeiture is neither wholly nor partially waived, a judgment of forfeiture is a total and instantaneous dissolution of the corporation; and no execution could issue, because there would be no defendant *in esse*, against whom it could run, and nothing to seize, because of the dissolution. In the case of *Mumma* v. *The Potomac Company*, Judge Story says, "There is no pretence to say that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man." It has frequently been decided, and in this state, that if judgment be had against a man, and he die before execution, no execution can issue against him.

The legislature of this state have neither wholly nor partially waived their right of forfeiture, but, on the contrary, have directed that, on proof of any act or omission which would in law work a forfeiture, a judgment of forfeiture shall be rendered against the corporation, the consequence of which is, as we have already seen, a total dissolution, and an extinguishment of all the rights and obligations of the corporation.

If it be true, however, that a writ of execution to seize the franchises must issue before the corporation can be dissolved, it may be remarked, that in the case of the Bank of Port Gibson, no such execution has been issued, as appears by the record, and consequently the corporation remains undissolved, and the trustees cannot be entitled to take possession of the assets, and prosecute this suit, until the title of the bank to do the same is

Digitized by Google

divested by the issuance and service of such execution. For this reason alone, then, the motion to substitute the trustees in the prosecution of the suit in place of the bank, cannot be sustained, and, if the court are right in that position, a rehearing of the case should be granted.

In the course of the voluminous and learned discussion which this cause has occasioned, much has been said of the hardship of the common law, in reference to dissolved corporations. A moment's reflection will satisfy an unbiased mind that, if any hardship accrues to dissolved corporations, at common law, the fault is that of the corporations themselves, and not of the common law. By the common law is meant the unwritten laws of England, consisting of the general customs of the realm, communicated from the former ages to the present, solely by word of mouth. 1 Blac. Comm. Private corporations are created by written statutory enactments, and form no part of the common law; they are special and partial grants of liberties and powers to one or more persons, in derogation not only of the common law, but of the common rights of the people at large. Ang. & Ames on Cor. 41, 42. When the charter of the East India Company was under discussion in parliament, its opponents denounced it as an "attack on the chartered rights of man;" and so it proved to be. The same might be said of the Bank of England, and of every bank that has ever been chartered in this country. In the United States, the common law right of private banking belongs to every individual, unless that right be prohibited by statutory enactment. In this country, eight hundred banks have been chartered, with a variety of powers, all of which were unknown to the common law, and therefore abridge the common law rights of the people to that extent. These corporations are artificial, invisible and intangible, existing only in contemplation of law by means of a written charter. Being unknown to the common or unwritten law, no rule or custom was established by that law with regard to their dissolution. Charters in England were granted either by the king or parliament, for certain specified purposes, and with limited or perpetual duration; but they contained no pro-

Digitized by Google

vision for an heir or legal representative, capable of inheriting their property in the event of dissolution. The common law of descents was therefore applied, whereby the personal property of the dissolved corporation escheated to the government, the real estate reverted to the grantor and his heirs, and the debts due to it and from it were extinguished. At common law, in England, on the death of a *man*, the debts due to him and from him were extinguished, because executors and administrators had no right of action until the 31 Eliz. 3. See Coke 2, 5 Inst. 404. In the United States, similar statutes exist, in avoidance of this common law rule. In this state, see H. & H. Digest, 393, § 27, 28, 412, § 88, by which rights to sue and be sued are given to executors and administrators. The same rules of descent which apply to the real and personal property of a dissolved corporation in England, prevail in all the states of this Union, with regard to the property of deceased persons. If a person die without heirs his property escheats to the government. If a grant of lands be made to hold during the life of the grantee, on the death of such grantee, the land reverts to the grantor and his heirs. With regard to natural persons, these rules are universally admitted to be just, but apply them to a corporation, and, we are told, an unpardonable sin is committed.

For the foregoing reasons, in addition to the views submitted in my previous opinion in this case, I am still unshaken in the conviction that the statute of 1843, authorizing a judgment of forfeiture against incorporated banks, is not sufficient to avoid the common law consequences of such judgment of forfeiture; but, on the contrary, so extinguishes all the franchises, privileges, rights and credits of the dissolved corporations, that the trustees, contemplated by the statute, can take nothing by their appointment, save the personal property of the corporation dissolved.

It has been with extreme reluctance that I have differed with the majority of the court on the questions involved in this important case; but, with my views of the law, I could not conscientiously do otherwise. The statute of this state provides that "any

Digitized by Google

judge of this court, differing in opinion from a majority of said court, shall reduce his opinion to writing, and the reasons therefor, and shall file the same among the records of said court, and any judge of said court, neglecting or refusing to comply with the provisions of this section, shall be deemed guilty of a misdemeanor in office, and shall be liable to a removal therefor." H. & H. 531, s. 5.

Digitized by Google

The Commercial Bank of Natchez *vs.* The State of Mississippi.

In a proceeding against a corporation, as such, for forfeiture of charter, the performance of conditions precedent to the existence of the corporation, cannot be inquired into; its existence as a corporation is admitted by the proceeding against it.*

The charter of the Commercial Bank of Natchez provided that no person, firm, or corporation, should, in the original subscriptions for stock, on any one day subscribe directly or indirectly, or procure any other person to subscribe, with the understanding that it should be transferred after the books were closed, for more than fifty shares of stock; in a proceeding by *quo warranto* against the bank it was alleged, as ground of forfeiture, that more than fifty shares had been subscribed for, in violation of that section of the charter, and that the stock had been afterwards transferred: *Held*, that these subscriptions for stock being under the superintendence of eight commissioners named in the charter, and under their supervision, and before the bank had a corporate existence, the bank, as such, could not be held responsible for the violations of law of those commissioners who were the agents of the state.*

Bona fide subscribers to stock in a bank cannot be affected by irregularities which occur in the subscriptions for stock preliminary to the organization of the bank, made under the supervision of agents of the state, appointed for the purpose of organizing the bank.*

It was provided, in the charter of the Commercial Bank of Natchez, that "should any stockholder refuse or fail to pay any instalment on his stock when called for, the company shall sell said stock, on giving thirty days' notice in some gazette on account of and at the risk of the stockholder:" *Held*, that a failure on the part of the bank to comply with this provision was not a cause of forfeiture of the charter of the bank; the authority to sell the stock was a mere cumulative remedy, given to the corporation to enable it to coerce the payment of stock in a more speedy manner than by action at law.*

---

* By Mr. Chief Justice Sharkey; the other judges giving no opinion on these points.

Digitized by Google

Commercial Bank of Natchez *v.* The State of Mississippi.

A refusal by a bank, on proper application, to pay its notes, bills, bonds and other liabilities issued by the bank, in specie, is a cause of forfeiture of the charter of such bank.

The charter of the Commercial Bank of Natchez contained no provision which in so many words required the bank at all times to pay specie; by its charter the capital stock was to be paid in gold or silver, or the notes of specie-paying banks, and the bank was prohibited from issuing notes to a greater amount than three times the amount of the capital stock paid in; by another section of the charter it was provided that if the bank refused to pay its notes on demand, the holder might demand an interest of twelve and a half per cent. per annum on such notes, the payment of which had been refused: In a proceeding by *quo warranto* against the bank, it was alleged, as cause of forfeiture, that the bank, on the first day of November, 1841, and on divers other days before and since, did refuse, on demand being made at its counter, in its banking house during the regular hours for doing business, to redeem, in specie or other lawful money of the United States, the notes, bills, bonds, and other liabilities issued by said bank and then due: *Held*, on demurrer by the bank, that the cause of forfeiture was sufficiently pleaded and the demurrer must be overruled.

In a proceeding against a bank for forfeiture of charter, alleging, as cause of forfeiture, a suspension of specie payments, the answer of the bank that it paid all its notes and liabilities, except certain checks which it had drawn on another bank, for payment of which provision had been made with that bank, but it failed to pay them, and they were returned; and on being returned, the bank which issued them was unable to pay them at the time, but in two years afterwards, and before the commencement of any proceedings against it, it resumed specie payment on these checks, and all other liabilities, whenever payment was demanded at its counter, and was then paying specie, was *held* not to be a sufficient answer to the charge of forfeiture, and no excuse for the suspension.

How far a mere temporary suspension of specie payments by a bank will work a forfeiture of charter, and what is a *temporary* suspension? *Quære?*

In the year 1840 the Commercial Bank of Natchez, chartered previously, being in a state of suspension of specie payments, the legislature passed a law that all the banks in the state by the first of April, thereafter, should pay specie on their notes of five dollars; by the first of July on their notes of ten dollars; by the first of October on their notes of twenty dollars, and by the first of January, 1841, on all their notes, bills, and other liabilities: *Held*, that this act was constitutional and valid; and a failure on the part of the bank to comply with the provisions of the law would work a forfeiture of its charter.

An act of incorporation is a contract within the meaning of the constitution of the United States, and any legislative act which impairs it by enlarging the

Digitized by Google

power of the state over the body corporate, or by abridging its franchises, or which alters it in any material point, is void.

On appeal, from the circuit court of Adams county; Hon. C. C. Cage, judge.

The State of Mississippi instituted proceedings in the circuit court, against the Commercial Bank of Natchez, under the act of 1843, known as the *quo warranto* law, the substantial provisions of which, are as follows, viz.: The *first* section was in these words: "That it shall be the duty of each and every district attorney in this state, whenever he shall have reason to believe, or whenever the affidavit of one or more credible person or persons shall be presented to him, stating that he or they have good reason to believe, and do verily believe, that any incorporated bank, located within his district, has been guilty of a violation of any of the provisions of its charter, or has done or omitted to do any act or acts the doing or omission of which would in law work a forfeiture of its charter, or is commanded or prohibited by its charter, or any statute of the state in relation to banks, forthwith to file a bill in the clerk's office of the circuit court of the county in which such bank shall be located, an information in the nature of a *quo warranto* against such bank, upon the filing of which information, it shall be and is hereby made the duty of the clerk of such court to issue the proper process against such bank, returnable to the term of the circuit court aforesaid, next succeeding the day on which such information shall be filed." The *second* section is in all respects similar to the first, except that it is made the duty of the district attorney to file this information when he has reason to believe or is presented with an affidavit setting forth that the affiant has reason to believe, and does verily believe that "any corporation, person or persons are exercising, using and enjoying within the district of such district attorney, without legal warrant and authority, the franchise of being a banking corporation."

The *third* section provides the mode of serving any process

Digitized by Google

issued against any bank under an information filed according to the act.

The *fourth* section enacts that the information, when thus filed shall be docketed on the common law issue docket; shall be tried at the first term of the court by the ordinary jury in attendance upon the court when an issue in fact is presented, and shall have priority over other cases.

The *fifth* section excepts the application of the law to the funds which legitimately belong to the state of Mississippi; to the Commercial and Railroad Bank of Vicksburg or to the west Feliciana Railroad and Banking Company, so as to affect the railroads and their operations.

The *sixth* section is as follows: "That upon information being filed in pursuance of this act, it shall be the duty of the clerk as a matter of right on the part of this state, to issue an injunction or injunctions to restrain all persons from the collection of any demands claimed by said bank or banks, person or persons, or assignees or corporations and all their officers and agents, or other person or persons, until the said information be finally tried and determined, and said injunction shall have the office and effect of an injunction in chancery; which injunction shall be served by the sheriff or other proper officer of the county in which said information may be filed upon such corporation, bank, assignee or assignees, if any there be, person or persons, or their officers or agents, in like manner as injunctions in chancery are served."

The *seventh* section provides that none of the provisions of the act should be so construed as to prevent any bank from suing out attachments in the same manner and for the same cause that other creditors were allowed lawfully to do.

The *eighth*, *ninth* and *tenth* sections enacted that upon judgment of forfeiture against any bank or corporation, the debtors to such bank or corporation should not be released thereby from their debts and liabilities to the same; but that the court rendering the judgment of forfeiture should appoint one or more trustees to collect the debts due to the corporation, to sell and dispose of all of its property and the proceeds to apply in pay-

Digitized by Google

ment of the debts of the corporation as they might thereafter be directed by law. The trustees are required to give bond for the faithful discharge of their duties, and upon embezzlement of any of the assets of such banks as might be placed in their control, and the conviction thereof, they, in addition to the payment of their bond, are to be punished by not less than two nor more than ten years imprisonment in the penitentiary.

The *eleventh* section provides that the act shall not be construed so as to release any one interested in or connected with any bank from his individual liabilities for any fraud or mismanagement of the same.

By the *twelfth* section it is ordered that the act should take effect from its passage.

At the commencement of the proceedings in this case an affidavit was made by W. F. Walker as relator, alleging various causes of forfeiture against the bank, which was filed in March, 1844, upon which the information issued and the bank was summoned to answer. A writ of injunction issued at the same time.

On the return of the process the bank moved to quash the information, on various grounds, and also to dissolve and set aside the injunction on various grounds. These motions were overruled. And a bill of exceptions taken to the decision of the court in overruling the motion to dissolve or set aside the writ of injunction.

The bank then pleaded its act of incorporation passed by the legislature on the 27th February, 1836, averring a subscription to the amount of $500,000, as provided for in the charter, and that the bank thereby became a body politic, &c., in the usual form of such a plea in bar.

To this plea the state, by the district attorney, replied, filing twelve replications, and alleging as many breaches or violations of the charter, and which are in substance as follow:

1. That during the subscription of the capital stock, on the 15th March, 1836, in Natchez, divers persons did, on that day, indirectly subscribe for more than fifty shares of the stock, by procuring other persons to subscribe for them, with the under-

Digitized by Google

standing that the latter should transfer to the former, and that such transfer was made accordingly.

2. that the one-fifth of the sum of $500,000 was not paid in at the time of subscribing, in gold or silver or in the notes of specie-paying banks, and that the bank proceeded to do business as a banking company without the fifth having been paid in.

3. That the bank so wilfully mismanaged its affairs that on the first of January, 1838, and at other times the bills emitted and in circulation exceeded three times the amount of the capital stock subscribed and actually paid in.

4. That after the bank went into operation, in establishing its branches under the 8th section of the charter, it did not require the one-fifth of the stock subscribed for, for the branches, to be paid in, in gold or silver, or notes of specie-paying banks.

5. That divers stockholders failed to pay the instalments on their stock, and that the bank failed to sell or expose to sale the stock of the delinquent stockholders, as provided in the 8th section of the charter.

6. That after the bank went into operation she made a corrupt agreement with the Alabama and Mississippi Railroad Company, by which the bank procured a large amount of the depreciated notes of that company, to be returned in the same kind of depreciated paper, but which the Commercial bank loaned out at par with gold and silver, and thus usuriously and corruptly received great and illegal gains in violation of the charter.

7. That the legislature passed a law on the 21st February, 1840, by which it was provided, among other things, that no bank should issue any post note or other evidence of debt payable at a day subsequent to the date thereof, and that the bank, subsequent to the passage of this law, issued checks on the Merchants Bank of New Orleans, payable on a day subsequent to the date thereof, in violation of said law.

8. That after the bank went into operation, on the 21st of February, 1840, a law was enacted, which required all the banks of this state to resume specie payments in all their liabil-

Digitized by Google

ities, from and after the 1st of January, 1841, and that on that day and subsequently, the bank did fail and refuse to redeem in specie its liabilities when demanded at its counter.

9, 10, 11. That the bank did not, within six months after she went into operation, establish a branch at Canton with a capital of $600,000, nor a branch at Holmesville with a capital of $150,000, nor a branch at Shieldsborough with a capital of $150,000, as provided in the 8th section of the charter.

12. This replication is the same as the first, except the additional averment that the indirect subscription of stock, to a greater amount than fifty shares in one day, was done with the knowledge and consent of the superintendents of the subscriptions.

The bank, by its counsel, demurred to the 1st, 5th, 7th, 8th, and 12th replications generally, and also assigned special causes as follow:

1. To the first replication, That it does not set forth with sufficient certainty the persons who subscribed indirectly, or the amount thus subscribed.

2. That it does not set forth the names of the persons procured to make the subscription, nor the time or place of the transfer of the stock to those who procured the indirect subscriptions.

3. That the replication does not allege that the indirect subscription was done with the knowledge or consent of the superintendents of the subscriptions.

4. And that the replication does not contain a sufficient statement of any legal cause of forfeiture.

To the 5th replication:

1. That it does not state either the names of the delinquent stockholders, or how many there were.

2. Nor the amount of the stock on which the instalment was not paid, nor the number of shares.

3. Nor that said delinquent stockholders were called upon or notified to pay the instalment.

4. And that the cause alleged is not in law a ground of forfeiture.

Digitized by Google

To the 8th replication:

1. That it does not state the particular notes, bills, &c. which were presented for payment, and payment refused, nor the persons who presented or held them.

2. That it does not allege with sufficient certainty, that the notes, &c. were due on the 1st January, 1841.

3. That it does not show any legal ground of forfeiture, and is not well pleaded.

4. And that the provision of the law mentioned in the replication is unconstitutional and void.

To the 12th replication:

1. That it does not specify what persons subscribed indirectly, or how much, or how many shares so subscribed.

2. That it does not mention the names of the other persons alleged to have been used.

3. That the indirect subscribing is not a legal cause of forfeiture.

4. And that the replication is too uncertain.

The District Attorney joined in these demurrers to the 1st, 5th, 7th, 8th and 12th replications.

To the 2d replication the bank rejoined, and on that there was an issue to the country.

To the 3d replication there was a rejoinder and issue to the country.

To the 4th replication there was a rejoinder and issue to the country.

To the 6th replication there was a rejoinder and issue to the country.

To the 9th, 10th and 11th replications respectively, there are two rejoinders; and the agreement of the district attorney that the two separate rejoinders might be pleaded to each of the replications.

The first of each of the rejoinders avers that the branch was established within the six months, with the capital required by the 8th section of the charter, and an issue taken to the country.

The second of each of these rejoinders to the 9th, 10th, and

Digitized by Google

11th replications respectively, is a special one, averring a waiver of forfeiture on the part of the state, by the passage of a law on the 12th May, 1837, entitled "An act to change the name of the Commercial Bank of Natchez, and for other purposes," which repealed the provision of the charter requiring all the instalments for stock to be paid within fifteen months, and left it discretionary with the directors of the bank to make calls on the subscriptions of the stock. By the passage of another act, on the 12th May, 1837, entitled "an act to guard against the insolvency of banks and moneyed corporations of the state, &c. which provides for commissioners, to inspect the affairs of the bank, ascertain their condition, to institute proceedings against those who violated their charters, and make report to the acting governor, whose duty it is to communicate the same to the legislature. That these commissioners were duly appointed; that this bank was subject, by her charter, to this examination, and that the examination was made several times by the commissioners. That in their report to the governor, laid before the legislature and dated the 8th January, 1839, the commissioners expressly state that this bank had not established her branches in conformity to her charter, but that she had in this respect violated her charter; and attention is emphatically called to this conduct of the bank, and the penalty of forfeiture contained in the charter; all which was communicated to the legislature then in session. That the commissioners also made a report on the 12th January, 1838, to the governor, and through him to the legislature, in which the fact is again distinctly stated, that the bank had not given to her branches as much capital stock as the charter required. That the legislature, on the 6th February, 1841, passed a law "providing for the withdrawal of the branches of the Commercial Bank of Natchez, and for winding up the same," which act authorized the bank to wind up all the branches except that at Canton, in the manner stated in the act, and to sink the capital stock to $2,000,000, &c. By which it is alleged that the state hath waived said supposed forfeiture of the charter.

The district attorney demurred to this second set of rejoin-

Digitized by Google

ders to the 9th, 10th and 11th replications, and the bank has joined in demurrer.

The demurrer of the bank to the 7th replication was sustained, and judgment on it in favor of the defendant by the court below.

The demurrers of the bank to the 1st, 5th, 8th and 12th replications were overruled by the court below, and *respondeat ouster* awarded.

The demurrers of the state to the second rejoinders of the bank to the 9th, 10th and 11th replications were sustained, and *respondeat ouster* awarded.

The bank then rejoined, and took issue on the first replication.

To the 5th replication there is a special rejoinder, alleging a waiver of forfeiture on the part of the state, by the passage of the act of the 6th February, 1841, authorizing the bank to withdraw her branches, &c.

To the 8th replication there is a special rejoinder, that since the passage of the act of 1840, requiring the banks to resume specie payments, the bank did pay specie on all her notes and other evidences of debt, except certain checks drawn after the 1st January, 1841, by the bank on the Merchants Bank of New Orleans, and for the payment of which by the Merchants Bank, when presented, the Commercial Bank had provided the means in the hands of the Merchants Bank. That the bank failed to pay them, and the Commercial Bank was unable to do so at the time; but in December, 1843, before the filing the information, the Commercial Bank resumed specie payment on these checks and all other liabilities, and since that period continues to pay specie.

The second rejoinders to the 9th, 10th and 11th replications, after the *respondeat ouster* plead a waiver of forfeiture by the state, by passing the law of May 13th, 1837, already referred to, by passing a law on the 14th February, 1838, taxing all bank stock twenty-five per cent., which the bank by its charter was liable to be taxed, and that the stock of the bank has been assessed and collected since the passage of said act; since which

Digitized by Google

the legislature passed the act of 1841, authorizing the bank to withdraw its branches, &c.

To these special rejoinders the district attorney demurred, and the bank joined in the demurrer.

The bank took issue, by rejoinder, to the 12th replication, to the jury.

The court then (being at the May term, 1845,) sustained the demurrers of the district attorney to the amended rejoinders to the 5th, 8th, 9th, 10th and 11th replications; and thereupon rendered a judgment of forfeiture against the bank generally; appointed a trustee to take charge of the bank; awarded an execution for the seizure of the effects and property to be put in the hands of the trustee, if not voluntarily surrendered to him.

The bank thereupon prayed an appeal, which was granted.

J. T. McMurran, for appellants.

1. The violation by the superintendents of the subscription to stock, of the provision in the charter regulating that subscription, did not prevent the charter from taking effect. 12 Wheat. 64; Ib. 80; Ang. & Ames Corp. 88, 89; 1 Hop. Ch. R. 587 – 591; *Meades* v. *Walker*, 1 Pet. R. 46 – 65.

The state is estopped by the acts of her agents, in organizing the bank under the charter. *Sheppard* v. *Commonwealth*, 1 Serg. & Rawle, 1 – 14.

The pleadings are against the bank in its corporate capacity, and not against the individuals usurping bank powers, and thus admit the incorporation. Acts of July, 1843, 52 – 57; Angell & Ames Corp. 637, 638; 15 Wend. R. 125 – 128.

2. The requirement to sell the stock of delinquent subscribers was an additional remedy merely, and a failure to sell the stock caused no violation of charter. 9 Wend. R. 384, 385; *Thompson* v. *The People*, 23 Wend. R. 583; *Utica Bank* v. *Swarthy*, 22 Wend. R. 770; *People* v. *Man. Bank*, 9 Wend R. 351, 373, 374; *Minor* v. *Mechanics Bank*, 1 Pet. R. 48 – 66.

3. The 8th replication of the state is defective in substance and form; and were it otherwise, the rejoinder of the bank contains a sufficient answer. Laws of 1840, 15; *Campbell* v.

Digitized by Google

Union Bank, 6 How. R. 625; 10 Wheat. R. 392; 2 Johns. R. 378; 4 Pick. R. 464; 3 Comyn's Dig. 272; Tit. Franchise, G. 3; *Thompson* v. *The People*, 23 Wend. R. 576–581; Angell & Ames Corp. 660–662; 23 Wend. 232, 235, 236; Angell & Ames Corp. 661; 6 Cow. R. 211, 215, 216, 217, 219; 1 Hopk. Ch. R. 361; 2 Stew. Al. R. 37; 1 Spear's S. C. Rep. 433, (Judge Butler's opinion); Ibid. 437, 440, 451, 456, 471, 485; 23 Wend. R. 193, 202, 217, 595; 9 Wend. R. 351, 373, 379, 382; *Commonwealth* v. *Andre*, 3 Pick. R. 224; 10 Mass. R. 155; 9 Ohio R. 203, 288, 290; 2 Cow. R. 45; *State* v. *Banks*, 2 McMullin's S. C. Rep. 439.

4. The injunction should be dissolved. *Rex* v. *Mayor of Derby*, 2 Salk. R. 436.

John D. Freeman, attorney-general, on the part of the state.

1. The demurrer was properly overruled to the first replication. The corporators were usurpers. Charter of bank, § 1. 9 Cow. R. 205; 18 Johns. R. 137, 138; 23 Wend. R. 206; 15 Ibid. 126, 127; 3 Ark. R. 570; 15 Johns. R. 358, 378.

2. It was cause of forfeiture that the bank did not sell the stock of delinquent stockholders. A. & A. 661; Ibid. 2d ed. 639, and authorities cited.

3. The refusal of the bank to pay specie was a cause of forfeiture. *Calder* v. *Buell*, 3 Dallas R. 391; 2 Ibid. 304; *Call* v. *Hagar*, 8 Mass. R. 430, 445; Ibid. 472; Statute of Mass. 1812, ch. 140; 16 Mass. 259; 1 Spear's R. 446; *Portland Bank* v. *Apthorp*, 12 Mass. R. 264; *Planters Bank* v. *Sharp*, 4 S. & M. 17.

Sanders and *Price*, on same side, cited the following authorities: 2 Bouvier's Law Dic. 142; 2 Black. Com. 153; 9 Cok. R. 50; 3 Bl. Com. 262, 263; *Terret* v. *Taylor*, 9 Cranch, 43; 3 Cond. R. 254; *Commercial Bank of Rodney* v. *The State*, 4 S. & M. 439; Bouv. Law Dic. 483; 6 Cow. 217; Gould's Pl. 24, § 24; Ibid. 168, § 195.

Digitized by Google

George S. Yerger, for the Bank.

1. The first and twelfth replications show no cause of forfeiture. Ang. & Ames R. 661; 15 Wend. 125, 128; 23 Ibid. 582, 583; *Meade* v. *Walker*, Hopk. R. 591; 1 Peters R. 46; Ang. & Ames, 89; 10 Wend. 267; 2 Conn. 45; 1 Peters, 62, 63, 65; *The State* v. *The Commercial Bank of Manchester*, supra.

2. The provision requiring a sale of stock was merely directory; the remedies cumulative. Ang. & Ames, 427, 428, 661.

3. The seventh replication that it was prohibited from issuing post notes, and afterwards issued them, shows no cause of forfeiture. Its charter authorized their issuance. 6 How. R. 625, 679; 9 Wend. 351; Chitty on Bills, 545, 546; 4 Yerg. R. 210.

4. The non-payment of the notes or debts is no cause of forfeiture. 6 Cow. R. 215, 220; 23 Wend. 244, 250, 251, 581; 3 Cruise Dig. 302; 2 Stew. R. 30; 4 Pick. 460; Hop. R. 361; 1 Spear's R. 452, 453; 6 How. 679.

5. On the subject of the non-establishment of the bank, and the waiver by the state, Mr. Yerger cited 9 Wend. R. 351, 373, 379; 3 Pick. R. 224; 10 Mass. R. 155; 9 Ohio, 203, 288, 290; 2 McMullen's R. 439; 1 Pet. R. 309.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This was an information in the nature of a *quo warranto*, instituted in the circuit court of Adams county, against the Commercial Bank of Natchez, to have a forfeiture of its charter judicially declared, for alleged violations.

The bank pleaded its charter, to which plea the district attorney filed twelve replications, on some of which the bank took issue, and demurred to others. The demurrer to the seventh replication was sustained, but the demurrers to the first, fifth, eighth and twelfth, were overruled, and the bank rejoined. To these rejoinders the district attorney demurred, and these demurrers were sustained, and judgment rendered against the bank. As the issues of fact were not tried, the case comes up on the questions raised by the demurrers to the pleadings.

The points which arise out of the state of case, as it is pre-

Digitized by Google

sented by the pleadings, are ranged under five distinct heads, and will be considered in the order they were discussed. The first relates to the manner the stock was taken under the charter, the first section of which contains a proviso that no person, firm, or corporation, should on any one day, subscribe, directly or indirectly, or procure any other person to subscribe for stock, with the understanding that it should be transferred after the books were closed, for more than fifty shares. The first replication avers, that at the time subscriptions for stock were in progress and being received, to wit, on the 15th of March, 1836, divers persons did, within one and the same day, to wit, on the day aforesaid, subscribe each for more than fifty shares of the stock of said bank, indirectly, by procuring other persons to subscribe for certain shares, with the understanding between them that the stock so subscribed for, should be transferred to the persons obtaining such subscriptions to be made, which stock was so transferred. To this replication the defendant demurred for special causes, amongst others, that it was uncertain. On the overruling of the demurrer, there was a rejoinder of general denial. The first ground relied on for a reversal is that the demurrer was improperly overruled, because if the charge were even well pleaded, the fact pleaded did not amount to a forfeiture of the charter.

It is necessary to premise that the act incorporating the bank, directed that books should be opened for subscriptions to the capital stock, on a certain day, under the superintendence of eight commissioners named in the act. The second Monday of March, 1836, was the day appointed; the indirect subscriptions are charged to have occurred on the 15th of March, 1836, which was the day of opening the books. This provision of the act was entirely directory to the superintendents or commissioners. If any violation of the act occurred, it was whilst the whole matter was under their supervision. Admitting, then, that such indirect subscriptions were made, they preceded the existence of the corporation. It cannot be held responsible for violations of law committed by the agents of the state, before it had a corporate existence. No right can be forfeited until it has been ac-

Digitized by Google

quired. By the failure to perform conditions precedent, a right may be defeated, or prevented from vesting, but it is not forfeited except for the non-performance of conditions subsequent. The second section declares that "as soon as the sum of $500,000 shall be subscribed, the subscribers, their successors and assigns, shall be a body politic and corporate by the name," &c. The sixth section provided, that so soon as the sum of $300,000 was subscribed, the superintendents should, by giving ten days' notice, convene the subscribers for the purpose of electing directors. Suppose the requisite sum had not been subscribed, there would not have been a corporation. It was not the act of the legislature, then, that created the corporation by virtue of its own immediate operative force. The corporation originated with the act, it is true, but a certain contingency was to happen — a certain amount of stock was to be subscribed before the act professed to give vitality to the artificial person. The persons who might subscribe after the passage of the act, were to constitute the corporation after they had subscribed a given amount. The case cited from 4 Paige's Reports, is a direct authority on this point, if any were necessary. It also decides, that the superintendents are the agents of the state, and not of the corporation; and this is manifestly so, since they derive their power from the act, and their appointment is made by it, and their duties defined. A corporation can have no agents until it has existence. *Bona fide* subscribers cannot be affected by irregularities which occurred under these agents of the state. A question, similar in its character, was raised in the case of *Minor* v. *The Merchants Bank of Alexandria*, 1 Peters R. 46. Fraud and collusion between the commissioners and original subscribers, were set up as a defence to the right of action, on the ground of violation of a condition precedent to the legal existence of the corporation. After having adverted to the provisions of the charter, for the purpose of showing that such irregularities did not vitiate the subscription, Judge Story remarked, "that it would be extremely difficult to maintain, upon general principles of law, that a private fraud between the original subscribers and commissioners, could be permitted to be set up, to

Digitized by Google

the injury of subsequent purchasers of stock, who became *bona fide* holders, without any participation or notice of the fraud." The case cited from 4 Paige's Ch. Reports, decides that such indirect subscriptions, made through third persons, do not affect the corporate rights, and can be vacated only by a person interested, who has been thereby deprived of the privilege of taking stock. See also Angell & Ames, 88, 89. It seems to me to be clear then, both on reason and authority, that these indirect subscriptions, in violation of the directions given by the state to its own agents, do not constitute a cause of forfeiture. The corporation did not then exist.

But there is another view in which the subject-matter of this replication has been presented, that requires to be noticed. It is said that the taking of stock, in strict accordance with the charter, was a condition precedent to the legal existence of the corporation, and that inasmuch as the stock was subscribed improperly, the corporation had not such legal existence, but that it has usurped authority. It is no doubt true that conditions precedent, prescribed by the charter, must be performed before the corporation can go into operation; but it is also true that the state may waive the performance of such conditions, and give existence to the corporation, just as it may waive a forfeiture for a breach of conditions subsequent. Or, by its own acts or admissions, made through its officers, it may be estopped from asserting the non-performance of conditions precedent; and such, I think, is its present attitude. It is a familiar rule that any confession or admission, or any allegation, made in pleading, will preclude the party from afterwards contesting the same fact in the same suit. A defendant cannot be sued in one character, and held responsible in another. The affidavit of the relator, which is the foundation of the information, charges the plaintiff in error as "the Commercial Bank of Natchez, an incorporated bank of the state, aforesaid," &c.; the information is against the Commercial Bank of Natchez, and so is the subpœna. The subsequent pleadings conform in this respect to the affidavit and process. After these admissions, the corporate existence cannot be questioned. The rem-

Digitized by Google

edy now pursued would be equally proper in case authority had been usurped without any act of incorporation, or in case the privileges granted had been exercised without performing conditions precedent; but for such usurpations the proceeding must be against the individuals who have committed the offence; whereas, when the proceeding is instituted for a forfeiture of charter, it must be against the corporation. This subject was very fully discussed in the case cited from 15 Wend. 113, and, after reviewing the previous decisions in New York on the subject, the rule is there laid down as stated, that if the proceeding be against a corporation as such, the performance of conditions precedent cannot be inquired into; the existence of the corporation is admitted. Other authorities give the same rule. Wilcox on Corp. 500; 4 Mod. 58. The replication, then, being against the corporation, was defective in substance in not alleging a good cause of forfeiture. It was not a replication of usurpation, because it charged the plaintiffs in error as a corporation.

The second point is, that the directors failed to sell the stock of subscribers who had not paid their calls. This question arises under a provision in the 8th section of the charter, which is in these words: "Should any stockholder refuse or fail to pay any instalment on his stock, when called for, the company shall sell said stock, on giving thirty days' notice, in some gazette, on account of, and at the risk of the stockholder." The replication as to the breach of this provision, charges that after the bank went into operation, to wit, on the 2d day of May, 1836, divers stockholders failed to pay the first instalment on their stock, then due, and directed to be paid by the directors at the banking-house, and that the bank did not, on such failure, on being requested, sell, or expose to sale, the stock of such delinquent stockholders." The demurrer to this replication was also overruled. The failure to comply with this provision was not a cause of forfeiture; the authority to sell the stock was a mere cumulative remedy, given to the corporation to enable it to coerce the payment of stock in a more speedy manner than by action at law. The usual remedy is by suit

Digitized by Google

on the agreement to pay the stock; and as well might it be said that a bank forfeited its charter by a failure to sue its stockholders for non-payment. There are other provisions in the charter which must be kept in view in connection with this, from which it will be seen that the authority to sell was a mere power conferred on the directory, to be exercised at their discretion. The first section directed that one fifth of the stock should be paid for at the time of subscribing, and the balance at such times as the directors might think proper to call for it, provided that all the stock subscribed for at the first opening of the books, should be paid for within fifteen months, and all subsequently taken, should be paid for within fifteen months from the time of subscribing. Within this prescribed limit, the collection of stock was left entirely with the directors; and it will not do to say they were bound to sell, at any rate, before fifteen months had elapsed. This would be to make the two provisions repugnant. By the act of 1837, the provision which required the stock to be paid for within fifteen months, was repealed, and the directors were authorized to call in the stock when they might think proper. Whether this act was accepted or not, it shows the view of the legislature on the subject. The principle now involved was decided in the case of *The Canal Company* v. *Sauson*, 1 Binney, 70. In chartering the company the legislature of Pennsylvania inserted a clause authorizing the directors to make the calls on the subscribers, with the further provision that the stock should be forfeited for non-payment of the instalments. The language of that charter was even more imperative than the language of this. After declaring that if any stockholder should neglect to pay the instalment, it provided for a forfeiture and sale of the stock, in the following words, to wit: "The same shall be forfeited to the company, and may and shall be sold by them to any person or persons," &c. This charter not only conferred the power to sell, but superadded a command that the power should be exercised, and yet it was held that the company had a discretionary power; that as the provision was intended to coerce payment it might be waived. In the case of *The Goshen and Min-*

Digitized by Google

sinck Road Company v. *Hurtin*, 9 Johns. 217, it was held that an action might be maintained on a written promise to pay, made by a stockholder, notwithstanding the provision in the charter for the forfeiture and sale. The principle decided by this case is, that the remedy given by the charter is merely cumulative. See also 2 Bibb, 577; 3 Hawkes, 520. In the construction of charters a distinction must be observed between those provisions which are intended to apply merely to the internal government of the corporation, and those which impose positive conditions, restrictions, or duties, in which the public interest is involved. For a violation of the latter, a forfeiture occurs, but not so with regard to the former. After the legislature had left the *time* of making calls, and the amount, with the directors, it is impossible to perceive any reason for construing the charter as making a positive command to sell. The power to sell was for the benefit of the corporation only. Believing, then, that this, like the preceding replication, was defective in substance, it was the proper subject for a demurrer. This view of the subject renders it unnecessary to notice the technical objections to the pleading. The matter being insufficient, it is immaterial how it was pleaded.

The next and most important question is, did the bank forfeit its charter by refusing to redeem its issues with specie? This question is raised by the eighth replication, which avers that by the act of 1840 all the banks in this state were required, after the 1st of January, 1841, to resume specie payments upon all their notes, bills and other liabilities of whatever denomination then due, and that after the act went into operation, "to wit, on the first day of November, 1841, and on divers other days before and since, the said Commercial Bank of Natchez did refuse, on demand being made at its counter, in its banking house in said city of Natchez, during the regular hours for doing business, to redeem in specie or other lawful money of the United States, the notes, bills, bonds and other liabilities issued by said bank, and then due." The demurrer to this replication was overruled, and thereupon the defendant rejoined. To the rejoinder the demurrer of the district attorney was sustained.

Digitized by Google

If the matter pleaded in the replication should be a good cause of forfeiture, it will then be necessary to determine whether it has been well pleaded.

The charter contains no provision which in so many words requires the bank at all times to pay specie, and yet it was obviously considered and looked to as a paramount duty. A part of the seventh section declares that "should said bank refuse at any time to pay its notes in specie, it shall be the duty of the cashier or teller, under the penalty of five hundred dollars, for each and every such refusal, to indorse on such note or notes, when presented, the date of their presentation, and the refusal of the bank to pay, and sign his name officially thereto; and all such notes shall bear interest at the rate of twelve and a half per centum, per annum, from the day of their presentation. Besides this provision the capital stock was to be paid in gold or silver or the notes of specie-paying banks, and the bank was prohibited from issuing notes to a greater amount than three times the amount of the capital stock paid in. These provisions prove that the capital was to be in specie, and that it was to be a fund for the redemption of the issues. But if the charter had been entirely silent, it was still a paramount duty of the bank to redeem its notes in specie, under an implied condition which necessarily resulted from the objects of its creation, and from the power to issue notes for a circulating medium for the profit of the corporation. This is a condition which is essentially imposed on every bank created with power to issue notes, and assented to by the acceptance of the charter. The proposition is self-evident that it was bound to redeem its issues with specie, and that a failure to pay at any period of its existence was a breach of that condition, a breach of duty, a violation of an implied pledge; and if there be anything which will constitute an excuse, and save a forfeiture, it must be found in the charter, or result from it by a fair intendment. The charter contains no direct authority for suspension, but it is said to be authorized, or at least excused by that provision which gives to the note-holder a right to demand an interest of twelve and a half per cent. per annum on notes that the bank refuses to pay. This is believed to be a

Digitized by Google

misapprehension of the effect of this provision. It furnishes no implied authority for the suspension of specie payments; it is but an indemnity for the note-holder; it looked to nothing else but the rights of individuals, or if it did the design was to compel the bank to do its duty. Viewed in this light, it would be strange reasoning to say that the means employed to coerce the discharge of a duty, constitute a good excuse for the breach; that the penalty imposed, legalizes the offence. The question of forfeiture is between the state and the bank; the question of interest is between the individual and the bank. If the mere claim of interest, or the right to demand it, will excuse the suspension, it may be continued for an indefinite time, and although a bank might in this way defeat the great object of its creation, yet a forfeiture could not be enforced. The exercise of sovereign power for the benefit of all, is a principle inherent in government, and it is not to be deprived of that power by remote implication; the intention must be manifest. It cannot be supposed that the legislature intended that the state should have no remedy for the abuse of power which it granted to the corporation, and that the bad faith to the state should be remunerated by making compensation to individuals. If so, an invitation, an inducement, was held out to the bank to refuse to pay specie, and thus to spread the evils of an irredeemable currency. The authorities do not bear counsel out in this position. In the case of the *Commonwealth* v. *Breed*, 4 Pick. 460, the question was whether the charter of a bridge had been forfeited. The act required that the draw should be attended by proper persons at the expense of the proprietor; and a penalty was provided for any delay that might be caused by a failure to raise it. No person was kept at the draw, but by a general understanding with the coasters that it would be more convenient to them, the key or crank was left there, so that the crew of the vessel might raise it themselves. The court remarked that any delay would subject the owner to a penalty, but would not be cause of forfeiture. It is manifest that the penalty was considered as an ample compensation to the owners of vessels who alone were interested. The public generally was not interested,

Digitized by Google

but the whole community have an interest in the soundness of currency. But besides, it appeared by the special finding of the jury that the attendance of a person at the draw was dispensed with by a general agreement with the navigators. They had waived the performance of a duty intended for their benefit. The great object of the bridge was the accommodation of the public crossing the water, and there was no impediment in this respect by the failure to attend the draw. The duty required of the proprietor in keeping some one at the draw to raise it, was substantially performed by his procuration. He agreed with the navigators to raise the draw and they did so. The object was to have the draw raised, so that delay might not occur, and the duty was performed. This was a substantial compliance.

In the case of *The People* v. *The Washington & Warren Bank*, 6 Cow. 216, the court remarked that a refusal to pay specie, unless arising from continued insolvency, was no ground of forfeiture, and that the remedy of the creditors would seem to be by action. That decision was made on a charter which in effect authorized a suspension, by providing that whilst it refused to pay, the bank should not do business, and the alleged ground of forfeiture was, that during its suspension, the bank had continued to do business. It was not the remedy of the creditor that was considered as justifying the refusal to pay specie.

The most direct precedent on this point is the case of *The People* v. *Thompson*, reported in 21 and 23 Wend. A charter had been granted to a bridge company which required that a bond should be given by the company for the due performance of the conditions imposed by the charter. The bond was given, and on a proceeding by *quo warranto* it was contended that the remedy on the bond was the only one; that by requiring the bond to be given, the other remedy had been abandoned; but the supreme court of New York held that the right to proceed by *quo warranto* was not thereby taken away or waived. On a review of this case by the court for the correction of errors, Senator Verplanck, in an opinion remarkable for its clearness

Digitized by Google

and force of reasoning, gave his unqualified assent to this principle which had been decided by the supreme court, although he differed on other points. The bond was regarded as furnishing a cumulative remedy. It is a general principle that a remedy given by statute does not take away a common law remedy unless negative terms be used, or where the matter is so repugnant that a negative may be implied. If a penal bond does not supersede the remedy by *quo warranto*, a statutory penalty will not, and much less reason is there for saying that the remedy, or rather the interest given to note-holders, will have that effect. It is in truth but a law that regulates bank interest.

But it is insisted that a refusal to pay specie does not necessarily work a forfeiture, even if it be not saved by the other remedy, and there are some authorities which seem to incline that way, whilst others hold to a contrary doctrine. The precise point, stript of all extraneous matter, or qualifying circumstances, has but rarely been the subject of direct adjudication, and indirect decisions, or incidental remarks are not reliable authority. A single question may serve to throw some light upon the right to suspend specie payments, and the consequences. Can the state create a bank and empower it to issue notes without requiring it to redeem them in specie? This question admits of none other than a negative answer. Can a bank, then, do what the legislature could not empower it to do, and still retain its franchises? On a careful examination of the authorities referred to, we find them correctly holding that conditions in a charter are to be construed as conditions in individual contracts, and to be construed most favorably to the grantee; that a substantial compliance is all that is required; that courts should incline against a forfeiture. The deduction of counsel is, that a mere temporary suspension will not be cause of forfeiture. From the most of the authorities it is impossible to extract any precise rule, susceptible of a certain practical application. There is but little diversity of opinion when the suspension is what is called permanent, or continued. Then all agree, with perhaps a solitary exception in Alabama, that it is cause of forfeiture. This was admitted in New York under charters that

Digitized by Google

sanctioned a suspension by requiring that during its continuance the banks should cease to do business. But the decisions do not define what they mean by a permanent or continued suspension or insolvency, and what by a temporary suspension. These terms have no definite legal meaning, and in common meaning they do not convey to the mind the idea of any precise rule by which to ascertain when a forfeiture has occurred. Nothing is permanent which may vary or change, and nothing can be said to be continued which does not remain in the same state. A bank might refuse to pay eleven months out of every twelve, and if on the twelfth it resumed, its refusal could not be said to be either permanent or continued. Before we proceed to lay down any general rule on this subject, it is necessary to determine what influence the statute law is to have on it.

In 1840, whilst the banks were in a state of suspension, the legislature passed an act requiring them to resume. By the 8th section it was provided that they should resume on their notes of five dollars by the first of April thereafter; on their notes of ten dollars, by the first of July; on their notes of twenty dollars by the first of October, and that by the first of January, 1841, they should resume specie payments on all their notes, bills, bonds, and other liabilities then due. The 8th replication is founded on this act, and if it be a valid law it must settle the question, at least as to a general suspension after the 1st of January, 1841. But it is said to be unconstitutional, because it imposes duties and obligations repugnant to the provisions of the charter. We recognize the doctrine to its full extent, that an act of incorporation is a contract within the meaning of the constitution of the United States, and that any legislative act which impairs it by enlarging the power of the state over the body corporate, or by abridging the franchises, or which alters it in any material point, is void; but no such effect is perceived as resulting from this act. We have said that it was necessarily a condition in the charter, a paramount duty, that the bank should redeem its notes with specie; we have also said that it acquired no right to refuse to redeem in consequence of the right given to the note-holder to demand interest. If these

Digitized by Google

positions be correct, it follows that it was always the duty of the bank to redeem. The state made no contract by which the bank could be excused from the performance of this duty. This act then superadds no new duty or obligation. It does not enlarge the power of the state; it does not diminish any power or privilege of the bank; it does not add to or vary the charter in the slightest degree to the prejudice of the bank. It only requires that to be done by express terms, which the bank was before impliedly bound to do. It was a command that the bank should by a certain day perform the condition of its contract. In effect it amounted to a waiver of the right to enforce a forfeiture for the previous suspension, and justified a continuation of the refusal to pay up to the 1st of January 1841, and if the banks then failed to comply with the requisition of the act, it was new cause of forfeiture.

But the question again arises under this law, did the bank forfeit its charter by every single isolated refusal to pay specie; or did it require a continued or permanent suspension to have that effect? No doubt a single instance of wilful and obstinate refusal, if properly alleged in pleading, would be sufficient. Still, it is difficult to say that exigencies might not arise which would excuse a mere temporary suspension. In this state of uncertainty it is not an easy matter to draw a line between what will, and what will not excuse. The adjudged cases do not do it. The law requires but a substantial compliance with conditions, and it is not rigid in enforcing forfeitures; yet if the utility of the corporation be lessened, or if an injury result to the public by an act which it is not authorized to do, it is a forfeiture. The grant to the corporation is made on an implied pledge that the conditions shall be performed, and when the public is affected by the breach of a condition, it is inexcusable. The condition is then not substantially performed. Not that the state is bound to prove an actual injury; if the act be such as in the nature of things, is calculated to produce the injury, then it is sufficient cause of forfeiture, and of this description is that charged in the replication.

But it was also said that a refusal to pay specie was no for-

Digitized by Google

feiture, because the legislature must have contemplated such a state of things when it authorized the bank to issue notes to three times the amount of the capital stock paid in. This provision is generally found in bank charters, and it is based upon the laws of a circulating medium, which, in a healthy state of affairs, are supposed to justify it. But a circulation to three times the amount of the capital stock is not justified under all circumstances. Expansions and contractions must be regulated by the discretion of the directors. The power is given to them on the supposition that it will be exercised with all proper precaution in view of the fluctuations to which circulating bank notes are liable. It is intended for the benefit of the stockholders, and the corporation must take the risk of a misjudged expansion.

We are thus brought to the inquiry, is a violation of the charter affirmatively shown with sufficient certainty by the eighth replication? for the state must lay a good charge; it is not for the corporation to bring forward excuses. It is not bound to answer an allegation which does not charge it with a breach of conditions that amount to a forfeiture. If a single instance of refusal to pay, or even a temporary suspension will not amount to a forfeiture, then something more must be charged in pleading, for the pleadings must follow the law. It was not necessary, then, to specify a particular note, or a particular person that had been refused, as single instances did not necessarily complete the offence. Was it necessary that the replication should have been more certain as to the duration of the suspension? Time is not usually material in pleading; still, where the offence or injury is incomplete if not continued for a given period of time, it must be pleaded as having been continued so long. But the law does not measure the precise time of suspension which is requisite to constitute a forfeiture. If the law be vague, the pleadings may be so. The bank is charged with having refused to pay its notes "on the first day of November, 1841, and on divers other days and times before and since." In torts, if a recovery is sought for a continuation of the offence, it is laid with a *continuando;* that is, from a cer-

Digitized by Google

tain day to a certain other day. If it be sought on the ground of a repetition of distinct acts of the same nature, then they may be laid as having been committed on a certain day, and on divers other days and times between that day and a certain other day, or between that day and the time of suing out the writ. Gould's Pl. 104, 105; 1 Saund. 24, note 1; 16 Mass. Rep. 470. This last mode of pleading is substantially followed by the replication, with but a slight variation in form. The refusal to pay was on a certain day, "and on divers other days and times before and since." It is equivalent to a charge that it refused on that day, and on divers other days and times between the time laid and the suing out of the writ, a period of more than two years. Proof would have been admissible under the pleading of repeated refusals from the 1st of November 1841, up to the time the writ was issued. The replication alleges with certainty to a common intent, an act which was cause of forfeiture. It follows in every material point the form which is found in the case of the *People* v. *The Bank of Niagara*, 6 Cow. 196, with which Chief Justice Savage said he was satisfied. The sufficiency of the replication was questioned in the case of the *People* v. *The Manhattan Company*, reported in 9 Wend., which is cited and relied on as an authority against the sufficiency of this replication, and it would be so if the two cases were entirely parallel. By the charter the company was bound to furnish and continue a supply of pure and wholesome water, sufficient for the use of all such citizens dwelling in said city as should agree to take it on the terms demanded by the company. The breach was that although a great number of citizens had at all times been willing and desirous to agree for and take from the Company pure and wholesome water sufficient for their use, and on such terms as should be required, yet the Company had not at any time since the passing of the act, furnished, or continued a supply of pure and wholesome water, sufficient for the use of all such citizens dwelling in said city as were willing and desirous to agree for and take the same. This replication was held bad, and it was manifestly so. The Company was only bound to furnish water to such as might

Digitized by Google

require it on the terms prescribed or agreed on, and no request or offer to pay was averred, or even notice to the Company of the desire of any one to take water. The company was not in default until it had been applied to and refused. There was nothing tendered in pleading on which issue could be taken. A rejoinder of general denial would have presented but an emotion of the mind, to wit, the willingness of the citizens to take water on the Company's terms. There are obvious distinctions between that case and this. The Company being only bound to furnish water to such as might desire it, a request was necessary, and not only a request, but an agreement to give the required price, a pre-contract. The only issue presented was an emotion of the mind, which is not triable. In this case a request or demand of the bank is charged. No contract or agreement was necessary, and the issue presented is a fact capable of ascertainment. We conclude, then, that the demurrer to the 8th replication was properly overruled.

In the next place was the defendant's rejoinder, which was put in after the decision on the demurrer, a sufficient answer to the replication. It avers that the bank, after the first day of January 1841, paid all its notes and liabilities except certain checks which had been drawn on the Merchants Bank of New Orleans, for the payment of which, provision had been made with said Merchants Bank, but it failed to pay and the checks were returned, and on being returned, the bank was unable to pay them; but that on the 1st day of December 1843, before the commencement of this suit, it resumed specie payments on the checks, and on all other liabilities, whenever payment was demanded at its counter, and is yet ready and willing to pay. We know of no good reason why the bank was not as much bound to pay its checks as its notes, or other liabilities. Beyond question it was, if the checks were put out for the purposes of circulation, and any provision which was made with the Merchants Bank for the payment of the checks, constitutes no excuse whatever. Were it otherwise, a bank might throw out all its circulation in checks or bills, and contend that it was only bound to pay specie on its notes. Nor does the resumption

Digitized by Google

of specie payments before the filing of the information, furnish any excuse. It was under the peculiar charter before noticed, that such a rejoinder was held sufficient in New York. The rejoinder was defective in form, being double, as well as in substance.

The question of waiver was discussed as applicable to the replication which charged the bank with a failure to establish branches. In the view taken of the case this question becomes immaterial, as does also the question in reference to the injunction. If the bank has forfeited its charter on either of the grounds taken, the effect is the same as though all were sufficient. The judgment must be affirmed.

Mr. Justice CLAYTON and Mr. Justice THACHER delivered the following opinion.

We concur in the foregoing opinion in all that relates to the suspension of specie payments, and the pleadings upon that point, and in the conclusion at which it arrives.

The other points were deemed unnecessary to be examined by us, and for that reason we give no opinion upon them, holding the question open as to them.

Digitized by Google

The President, Directors, and Company of the Planters Bank of the State of Mississippi *vs.* The State of Mississippi.

Where, in a subsequent statute, there is no express repeal of a former one, the former statute will not be considered repealed by implication, unless the repugnancy between the new provision and the former one be plain and unavoidable.

In the construction of statutes, the intention of the legislature is the cardinal rule of construction.

In 1843, the legislature passed a general law prescribing the mode of proceeding against banks that had violated their corporate franchises, (Acts of 1843, 52 — 57.) In 1843, proceedings in the circuit court were commenced under that act against the Planters Bank. In 1844, the legislature passed another act, in relation specially to the said Planters Bank and the Mississippi Railroad Company, authorizing them, upon certain conditions, to surrender their charters; and upon their rufusal to do so, making it the duty of attorney-general, and requiring him to proceed by bill in the superior court of chancery against them, have a receiver appointed to take charge of their property, and proceed to have them wound up; the law of 1844, provided that if either of the corporations should accept and comply with the conditions of the act by a voluntary surrender of its charter, then such bank should be released from the operations of the said law of 1843. The Planters Bank did not accept the conditions of the law of 1844; and the proceedings already instituted in 1843, under the law of that year, having progressed to judgment in the circuit court against the bank, that court declaring its charter forfeited and appointing trustees under the law of 1843, to collect its debts and take charge of its property, the bank appealed to this court; and the cause was here submitted on a preliminary motion, as to whether the law of 1844 had not repealed the act of 1843, and taken away the jurisdiction of the circuit court: *Held*, that there was no necessary repugnancy between the two acts, and therefore the latter is not by implication a repeal of the former; that no proceedings being instituted in the chancery court under the latter act, the circuit court did right to proceed to judgment under the law of 1843.

On appeal from the circuit court of Adams county; Hon. C. C. Cage, judge.

The state of Mississippi, under the act of the legislature of

Digitized by Google

1843, entitled, "an act to prescribe the mode of proceeding against incorporated banks for a violation of their corporate franchises, and against persons pretending to exercise corporate privileges, under acts of incorporation, and for other purposes;" * instituted proceedings in the circuit court of Adams county against the president, directors, and company of the Planters Bank of the state of Mississippi for an alleged violation of their act of incorporation. These proceedings were instituted on the 17th day of December, 1843.

On the 23d of February, 1844, the legislature passed an act, entitled, "an act to place the Planters Bank of the state of Mississippi, and the Mississippi Railroad Company in liquidation, for the payment of the state bonds issued on account of the Planters Bank and for other purposes," of which the following are substantially the provisions, viz.

1. The first section provided that the Planters Bank and the Mississippi Railroad Company should be put in a state of liquidation as provided for thereinafter.

2. The second, that, provided within sixty days after the passage of the act, those banks, or either of them, would surrender their charters to the state, by deed, then the governor of the state should appoint two commissioners in a mode prescribed to close and wind up the affairs of the corporation in a stipulated way.

3. The third section provided, that if the bank did, in the prescribed time, surrender its charter, and deliver its property to the commissioners, the attorney should forthwith proceed to file a bill in the superior court of chancery for the state, against such recusant bank, in favor of the state of Mississippi, for the use of the bond holders and all the creditors of the bank; such bill to contain proper allegations for a proceeding against such bank to vacate the charter thereof for the forfeiture of their charter; for which end the chancellor should direct issues, &c.

4. The fourth section made it the duty of the chancellor to

* The substance of this act of 1843 will be found in 4 S. & M. 439 — 442, and also *supra*, p. 601 — 603.

Digitized by Google

proceed to wind up the corporation, for the benefit of the creditors, with power to determine the order of priority, &c.

5. That after payment of the bonds of the state, issued, on account of the bank, the surplus of the assets of the bank should be divided among the creditors according to their legal rights.

Sections 6, 7, 8, 9, 10, 11, 12, 13, 14, prescribed the duties, obligations, responsibilities and penalties, imposed upon the commissioners, who should be appointed to take charge of and wind up the bank.

Sections 15, 16, 17 and 18, gave certain powers to the governor in ordering a special term of the chancery court, if necessary, in the prosecution of the case against the bank; to employ assistant counsel, &c.

19. This section was in these words: "Be it further enacted, that upon the corporations, or either of them, accepting of and complying with the provisions of the second section of this act, that they be released as to their acts or omissions, done or committed before the passage of this act, from the operations of an act, entitled, "An act to prescribe the mode of proceeding against incorporated banks, for a violation of their corporate franchises and against persons pretending to exercise corporate privileges under acts of incorporation, and for other purposes."

20, 21 and 22, provided for the salary of the commissioners; the penalty for embezzlement, and that the law should take effect from its passage.

The proceedings in the circuit court progressed to judgment against the bank after the passage of the law of 1844, that judgment having been rendered on the 12th day of June, 1845. The bank appealed from this judgment, and the cause at the present term of the court was submitted on a preliminary motion as to whether the act of 1844 was not a repeal of the act of 1843, as to the Planters Bank, and had not taken away the jurisdiction of the circuit court under that act of 1843.

Montgomery and *Boyd*, for motion.

We make the following suggestions:

1. The act of 1844 is a special act, in reference to the same

Digitized by Google

subject-matter as the act of 1843, which is a general act. The prior general law as to a whole class, would necessarily be repealed by a subsequent special act as to a part of the same class.

2. The law will not countenance cumulative penalties.

3. A subsequent affirmative statute will repeal a prior affirmative one, upon the same subject-matter, where the latter is inconsistent with the former.

The act of 1844 is inconsistent with the act of 1843 in every articular.

Under the first, a judgment of forfeiture, destroying the existence of the corporation, is to be pronounced. Upon this, a trustee is appointed by the circuit court, with special powers, not very well defined, and accountable only to creditors.

Under the record no judgment of forfeiture can be pronounced; but on the ascertainment of a forfeiture, the proceedings are continued as against an insolvent and not a dead corporation. A receiver is appointed, accountable to the chancellor, and with exact and specified duties. This takes place under the compulsory part of the act, but the other part is more inconsistent with the act of 1843, than the compulsory clauses. For, on a voluntary surrender, the whole proceedings are to be regulated by commissioners appointed by the bank and the governor. The inconsistency in either view is apparent.

4. The 19th section of the act of 1844 was construed by the circuit court to amount to a declaration that the act of 1843 was not to be repealed, unless the bank accepted the act of 1844. This is not the reading or meaning of the section. In it the legislature offer to relieve the bank from the act of 1843, if they will accept of the provisions of the act of 1844; but they do not say that, in case of a refusal, the act of 1843 shall still be in force. On the contrary, if the bank refuse, then it is made the express duty of the attorney-general to proceed against her, not under the act of 1843, but under the act of 1844. Nothing can be plainer. The offer in the section referred to, was intended as an inducement to the bank to accept the act of 1844; but if she declined, then the legislature directed the necessary force to

Digitized by Google

be applied, and left her to get on with the act of 1843, in the best way she could.

We think that even an express clause in the act of 1844, declaring that the act of 1843 should not be repealed, would not prevent the repeal which results from the very nature of the acts themselves. They cannot both be affirmed, on account of their absolute inconsistency, and of course the first must yield.

The chancellor, Buckner, has decided, that the act of 1844 did repeal the preceding acts of 1839–40, in relation to the Mississippi Railroad Company. The same principle applies here.

John D. Freeman, attorney-general, *contra*.

The proceedings authorized by the attorney-general in the court of chancery, were doubtless intended as a cumulative remedy to the state in the event that no prosecution was commenced in the circuit court, either at the instance of the district attorney, or of a citizen or private person; or in the event that such proceedings were commenced, and proved unsuccessful. Under the recent decision of this court on the statute of 1843, the circuit court has full power to wind up the concerns of the bank, and the remedy in that court, therefore, is as ample as the one provided by the law of 1844.

The 19th section of the act of 1844 clearly shows that the intention of the legislature was not to release the bank from the operation of the statute of 1843, except on the conditions therein stated; and inasmuch as such intention is apparent, the rule of law, that a special statute repeals a general statute on the same subject, does not apply here.

Mr. Justice CLAYTON delivered the opinion of the court.

This is a motion preliminary to the consideration of the merits of this cause. The question submitted upon motion is, whether the act of 1844, passed to place the Planters Bank and the Mississippi Railroad Company in a state of liquidation, repeals the act of 1843, in whole or in part, passed to prescribe the mode of proceeding against incorporated banks.

There is no express repeal. Statutes are not considered to

Digitized by Google

be repealed by implication, unless the repugnancy between the new provision and the former statute be plain and unavoidable. *Foster's case*, 11 Co. 56; 1 Kent Com. 466. The intention of the legislature in this, as in all other instances, is the cardinal rule of construction.

The intention to repeal is by no means manifest. To a certain point we perceive no necessary repugnancy between the two statutes. If, under the law of 1844, the attorney-general should file a bill on the part of the state, as therein directed, we have no doubt the pendency of such bill might be pleaded in preclusion of any prosecution under the act of 1843, should any such be instituted. We have as little doubt, that if a proceeding were instituted under the act of 1843, and during its pendency the attorney-general were to file a bill in the chancery court, that the chancery court might, upon application, grant an injunction to stay the proceedings in the circuit court. If the attorney general were to take any steps under the act of 1844, before a judgment rendered upon a proceeding on the part of any one else under the act of 1843, the government would be entitled to a preference, that would justify putting an end to or staying the other proceeding. But if the proceeding be commenced and prosecuted to judgment in the circuit court, without any step in the chancery court to interrupt it, we see no objection to its validity. There is in our view no such repugnancy in the provisions of the two acts, as to make the last necessarily operate a repeal of the other. A judgment under either might be pleaded in bar of any subsequent proceeding in the other court.

The 19th section of the act of 1844 provides, that if the banks therein mentioned should surrender their charters, under the provision of the second section, then they should be exempt from the operation of the act of 1843. This would seem to imply the intention of the legislature, that in any other state of case, they were not to be so exempted.

Digitized by Google

14 634
71 282
14 634
77 333

MARDEN HARISTON *vs.* ROBERT D. SALE.

In this country a contract for overseers' wages is not an entire contract by the year; and although an overseer may contract for a year, and may be turned off for misconduct before the time expires, he is, notwithstanding, entitled to recover for the time he conducted himself properly.

An overseer, having been engaged, cannot put another in his place, however equal to himself in capacity, without the consent of his employer.

H. engaged S. as an overseer for a year, at $650; before the year expired, S. left without the knowledge or consent of H., though he employed a substitute, who, during the absence of S., conducted the business of H. equally as well as S. could have done. S. sued H. for his full wages, and the jury returned a verdict in favor of S. for the whole sum claimed, with interest. H. moved for a new trial, and the court below overruled the motion: *Held*, that the verdict was excessive and a new trial should have been granted.

IN error, from the circuit court of Lowndes county; Hon. H. S. Bennett, judge.

This was an action of assumpsit, brought by Robert D. Sale against Harden Hariston. The declaration contained three counts. The first was founded on an instrument in the following words, to wit: "I am to give Robert D. Sale $650 for the year 1840, and, if I am satisfied with him, to add $25 more." "Harden Hariston." The second was a common count for work, and labor, and services rendered as an overseer; and the third was a common money count. The defendant pleaded the general issue. The jury found a verdict in favor of the plaintiff, for the sum of six hundred and seventy-nine dollars and four cents, and the court entered judgment accordingly. The defendant then moved for a new trial, which motion the court overruled, and the defendant filed a bill of exceptions, which sets out the following facts, viz.: That on the trial the plaintiff read to the jury the writing sued on, and the two following agreements, both of which were written on the same paper with the instrument declared on, to wit:

Digitized by Google

"Know all men, by these presents, that I, Robert D. Sale, of the county of Lowndes, Mississippi, have this day agreed to oversee for Harden Hariston, for the year 1839, and the said Sale agrees with the said Hariston, and binds himself to discharge the duties of an overseer, in an attentive and faithful manner, to attend to keeping the tools on the plantation in good order, to attend well to the stock of all kinds on the plantation of said Hariston; in fine, to discharge his duties as an overseer in such a way as to redound mostly to the interest of the said Hariston: and the said Hariston, on his part, in consideration of the obligation of the said Sale, and on his diligent and faithful compliance with the same, binds himself to pay the said Sale the sum of five hundred dollars, at the expiration of said year; and also to board the said Sale; and the said Hariston further agrees, that if the said Sale makes one hundred and eighty bales of cotton, averaging five hundred weight per bale, to pay him, the said Sale, one hundred dollars extra of the above five hundred dollars. As witness we have hereunto set our hands, and affixed our seals, this 25th day of January, 1839.

ROBERT D. SALE, (L. S.)
HARDEN HARISTON." (L. S.)

"In addition to the within the said Hariston agrees further, that if the said Sale shall make the said Hariston two hundred bales of cotton on his plantation, the present year, averaging five hundred weight per bale, to pay him the further sum of twenty-five dollars extra for the within; this 25th day of January, 1839.

ROBERT D. SALE, (L. S.)
HARDEN HARISTON." (L. S.)

It was admitted that the writing declared on was given in consideration of the plaintiff's services as overseer, on the plantation of the defendant, for the year 1840.

The defendant then proved, by several witnesses, that about the 1st day of December, 1840, the plaintiff, without the knowledge or consent of the defendant, employed his, plaintiff's, brother, a young man of about twenty-two years of age, to

Digitized by Google

superintend the defendant's business, while he, plaintiff, visited his sick mother in the state of Georgia, or Virginia. And that the plaintiff did not return to this state until about Christmas; yet all the witnesses, when interrogated on that point, testified that the business of the defendant was as well attended to during the plaintiff's absence as when he was at home; and that the defendant made a very abundant crop that year: which was all the evidence offered on either side.

The defendant removed the case to this court by a writ of error.

Grayson, for plaintiff in error.

The principle, that a party to an entire contract cannot abandon it and sue for his labor upon an implied assumpsit, is one too well settled to be now mooted. The question has been often adjudicated by this court. See *Leflore* v. *Justice*, reported in 1 Smedes & Marshall, and *Wooten* v. *Reid*. It is not contended by the counsel for the defendant in error, that the verdict was in accordance with strict law; but it is contended that the court, under the circumstances, ought not to grant a new trial upon the ground that substantial justice has been done.

It is a well settled rule that courts will grant new trials when the verdict is contrary to law or evidence. See 1 Burr. 390; 2 Ibid. 1216; W. Black. 463; 1 Term, 186; 3 Barn. & Ald. 692; 1 Harper's S. C. R. 56; 1 Bing. 158; 3 Tenn. 427; 3 Johns. 150; 8 Martin's Louis. 208; 9 Cowen, 73; 1 Wend. 475, 506; 1 Bay, 269; 5 Mass. 547; 5 How. 277.

But it is contended that this case is without the operation of the general rule, upon the ground that substantial justice has been done; and it is said that numerous cases are to be found in the books where the courts have refused to grant new trials, upon the ground that the jury found contrary to the evidence. These are, upon examination, found universally proceeding upon the ground that the jury found against the weight of evidence merely. Cases in which the plaintiff made out his case to the satisfaction of the jury, although he failed to satisfy

Digitized by Google

the court. Cases in which the law was in his favor, although the court doubted whether the evidence was sufficient to warrant the finding. Cases are also cited in which the court refused to grant new trials, where the plaintiffs failed to make out their cases on account of some slip in the pleadings. In these cases the court refuse to grant new trials upon the ground that on the whole case the plaintiff either did have, or could, by an amendment in the pleadings, have a right of recovery. It is not here as in those cases. The plaintiff, in the court below, by no amendment in the pleadings, nor in any mode in which the case could be presented, would be entitled to a recovery; the contract being entire, and he having abandoned it before an entire performance. It seems to me to be a settled rule of law, that if a man abandon his contract before he has performed his part, he cannot sue upon the special contract, nor can he waive the special contract, and sue upon the implied assumpsit for work and labor. If this be a settled rule of law it is a settled rule of justice; for, to the mind at all acquainted with or informed as to the true nature of our jurisprudence, a distinction between a rule of law and a rule of justice would seem to be absurd. The rules of positive law are all founded in natural justice, and they are sanctioned by a long experience of their great utility in subserving and answering the ends of justice. If the law required of the defendant in error a performance of his part of his contract, prior to his right of action against the plaintiff in error, then justice required it; and a verdict for him, without such performance, would be in violation of law, and in opposition to justice. As to the technical objection that the note sued on was given after the expiration of the overseer's term, the whole record shows the contrary. The contract is, upon its face, without date, but its date is sufficiently shown by the words of it, and the other portions of the previous contract for the year before, which was also in evidence. It is not described in the declaration as dated at any particular time, but there was merely an averment of its execution on a particular day, to meet the requirements of the rules of pleading.

Digitized by Google

Harris and *Harrison*, for defendant in error.

The declaration was not framed upon a special contract. If there was such a contract, the party should have availed himself of the benefit of it in the right way and at the proper time. The bill of exceptions does not show any, but goes on to state that "the defendant, Hariston, proved that about the 1st day of December, 1840, said Sale left without his knowledge or consent; that Sale employed his brother, a young man of about twenty-two years of age, to superintend defendant's business, and the plaintiff was absent until about Christmas, on a visit to Georgia or Virginia, to see his sick mother. Defendant's (Hariston's) witnesses all stated, when interrogated to that point, that the business of the defendant was well attended to in the absence of plaintiff, as well as if plaintiff himself had attended to it; that defendant made that year a very abundant crop, and that plaintiff (Sale) returned home about Christmas." There is nothing in this to prove that there was an entire contract, or that it was abandoned or put an end to by either party, or that either party desired to do so. Sale was temporarily "absent," and, as the bill of exceptions expressly states, "returned home" about Christmas. He went to see a sick mother; was absent about three weeks; had the business as well attended to in his absence as he could have done it himself; left with the intention of returning, and did come back before the expiration of the year. He served the balance of the year out, and then took the note for the money in consideration of his services for the year then just past. True, he was absent about three, or say four weeks, but we are under the impression that no case can be found in the books, where, under circumstances like these, it has been decided that the laborer is not worthy of his hire. Hariston, as his own witnesses proved, suffered no loss and sustained no damage. His business was not only attended to as well as the plaintiff below could have done, but in fact was "well attended to," and he made not only an abundant, but "very abundant" crop.

"When the equity and justice of the case are with the verdict, the circumstance of its being against evidence is not of itself

Digitized by Google

sufficient to set aside the verdict and grant a new trial." 1 Hayw. 14; *Hunter, Adm'r.* v. *McNeil*, 5 Ohio, 513.

"Where justice has been done, the court will not grant a new trial, or leave to plead, or let in a mere technical defence." *Bush et al.* v. *Critchfield et al.* 5 Ohio R. 114; *Bates* v. *Cooper*, Ib. 115; 6 Monroe, 61; 3 J. J. Marsh. 717; *Gregory* v. *Allen*, Mart. & Yerg. 74.

"Even where the verdict is plainly against law, yet the court many times properly deny a new trial." *Ex parte Bailey*, 2 Cowen, 479.

"To induce the granting of a new trial, there should be strong and probable grounds to believe, that the merits have not been fully and fairly tried, and that injustice has been done." 12 Wend. 47; 3 Johns. R. 532; Ib. 239; 2 Caines's R. 90; 5 Johns. R. 138; 8 Ib. 369; 2 T. R. 4; 1 Bos. & Pul. 339; 1 Taunt. 12; 1 Burrows, 11; Ib. 53; 2 Burrows, 664; Ib. 936; 4 T. R. 468; *Baynton* v. *Finnall*, 4 S. & M. 193.

As for the articles of agreement written upon the same piece of paper with the note, they have nothing to do with the case. They bear date in January, 1839, and contain the evidence of the contract for that year.

Mr. Justice THACHER delivered the opinion of the court.

Writ of error to Lowndes county circuit court.

The declaration contains a special count upon a promissory note, and also common counts. The instrument sued on is in the following words: "I am to give Robert D. Sale $650 for the year 1840. Harden Hariston." Plea, general issue. It was admitted, on the trial, that the note or memorandum sued on was given in consideration of Sale's services on the plantation of Hariston, for the year 1840. It was proved that sale was absent from the plantation nearly the whole of the month of December, 1840, without the knowledge or consent of Hariston; but that he procured a substitute during that time, who conducted the business equally as well as he could himself have performed it. A verdict and judgment were rendered for the

Digitized by Google

full amount of the sum claimed in the action; and a motion for a new trial was overruled.

The strict rule of law, governing contracts, has been much relaxed in this country in relation to those made between employer and overseer. In South Carolina, it has been held that a contract for overseer's wages is not an entire contract, by the year; but that although an overseer had contracted for a year, and was turned off for misconduct, he might, notwithstanding, recover for the time he conducted himself properly. *Byrd* v. *Boyd*, 4 McCord, 246; Ib. 249; Ib. 26. We are inclined to adopt this principle of decision. In this case, Sale was undoubtedly entitled to recover for the period of time that he himself was engaged upon the plantation; but there being no evidence that the services of his substitute were received by Hariston, there was no warrant for the finding for the full time. An overseer, having been once engaged, cannot put another in his place, however equal to himself in capacity, without the consent of his employer.

On account of the excess of the finding, the judgment of the circuit court must be reversed, and a new trial granted.

Digitized by Google

W. L. LANIER et al. *vs.* JOHN TRIGG et al.

L. being sued on a bond due in May, 1840, which was payable in the notes of a particular bank, plead that on the 16th of November, 1840, he tendered the amount in bills of the bank to the plaintiff, and that he brought the sum due with interest in the notes of that bank into court, ready to be paid to the plaintiff: *Held*, on demurrer that the plea was bad.

In an action on a bond payable in the notes of a particular bank, the measure of damages is the value of the article at the time of the breach, not its value at any subsequent period.

A plea of tender must aver a continual state of readiness to pay the sum due since the tender; for although the defendant under such averment may not be able to show its truth, yet its introduction enables the plaintiff to show, if the fact be so, that upon a subsequent demand, the defendant had failed to pay, which would defeat the defence.

Where a bond was payable on its face to B. it seems it is a matter of doubt whether it would be admissible in a court of law, to prove that the obligation did not originally belong to B. but to a bank.

Where a note is payable or belongs to a bank, and has been assigned by such bank since the act of 1840, prohibiting assignments by banks of their notes and other evidences of debt, in an action upon such assigned note, the only mode of the defendant's availing himself of the defence is by plea in abatement.

T. & R. being assignees of a note payable to B. sued the makers thereon, at law; the defendants plead payment and a special plea of tender, the substance of which plea was, that though the note was payable to B. on its face, yet it was in reality the property of the Hernando Bank when made, and was by agreement to be paid in the notes of the bank, which notes for the sum due they had tendered, six months after the maturity of the note to the assignees. A demurrer to the plea of tender having been sustained and a trial had upon the plea of payment, and verdict and judgment rendered for the assignees for the amount of the note; the defendants, on writ of error to this court, insist upon their right to pay the judgment in the notes of the bank by whom the note was thus assigned: *Held*, that the defendants below having permitted the suit there to be conducted by the plaintiffs as as-

Digitized by Google

signees of B. without question of their character in that particular by proper plea, had admitted their right to sustain their suit in that character, and it could not now be questioned.

In error from the Marshall circuit court; Hon. Stephen Adams, judge.

John Trigg and John K.Chester as assignees of William H. Bayliss sued William L. Lanier and Ransom H. Byrn upon the following bond:

"$500. *Holly Springs, 23d Jan'y.* 1840.

Four months after date we or either of us promise to pay W. H. Bayliss, or order, five hundred dollars, value received, with interest from date.

Witness our hands and seals.

W. L. Lanier, [L. S.]
R. H. Byrn, [L. S.]"

On the note was the following indorsements, viz.:

"For value received I assign the within note to Trigg & Chester, this 13th of May, 1840. W. H. Bayliss.

Received on the within note three hundred dollars this 16th November, 1840. T. & C."

The declaration was in debt; the breach the non-payment of the money.

The pleas filed were two; 1. The ordinary plea of payment before action brought. 2. The following special plea.

"*Actio non*, because they say that the said writing obligatory in the plaintiff's declaration mentioned was executed and delivered to the said W. H. Bayliss, for and in consideration of the sum of five hundred dollars, in bills made and issued by the Hernando Railroad and Banking Company, and payable by said company to the bearer thereof, and for no other or different consideration, and the said defendants further say that said bills were delivered over to them by the said W. H. Bayliss at the time said writing obligatory was executed, as the agent or trustee of said company, he being one of the directors and managers of the affairs of said company, and so represented himself

Digitized by Google

to defendants, and the said writing was made payable to him, said W. H. Bayliss, in confidence of his said representations that he was such agent, and in consideration of the bills or notes of said company paid over to said defendants by said W. H. Bayliss as aforesaid, and the said defendants aver that said Bayliss assured said defendants at the time they executed and delivered said writing, and as an inducement to them to make said writing payable as aforesaid, that payment of the same might and should be made in the bills or notes of said company, and the defendants say that at the time when the said sum of money became due and payable from the said defendants to the said W. H. Bayliss, they were, and from thence hitherto have been and still are ready to pay to the said W. H. Bayliss or to the said Trigg & Chester, his assignees and the plaintiffs in this action, the said sum of five hundred dollars, in the notes of said company, with all interest due therefor, at, to wit, in the county aforesaid; and after the time when said sum of money became due and payable, and before the commencement of this suit, to wit, on the 16th day of November, 1840, said defendants were ready and willing, and then and there tendered and offered to pay to said plaintiffs the said sum of money, and all interest, in the bills of the said Hernando Railroad and Banking Company, to receive which of said defendants, said plaintiffs then and there wholly refused, and said defendants now bring said sum of money, with all interest due thereon, into court, here ready to be paid to said plaintiffs if they will receive the same, and this they are ready to verify, wherefore they pray judgment, &c."

Upon the first of these pleas the plaintiffs tendered issue to the county; to the second they demurred. The court below sustained the demurrer, and the defendants refusing to plead further, a jury was empaneled on the issue, who found a verdict for the plaintiffs for $294,66; and the defendants prosecuted this writ of error.

J. F. Trotter, for plaintiff in error.

1. The agreement of Bayliss to receive the notes of the bank

Digitized by Google

in payment of the bond, though void at common law, is good and binding under our statute, approved February 21, 1840, the seventh section of which makes it unlawful for any bank to assign its notes; the assignment, therefore, by Bayliss was absolutely void, being in violation of the statute; the suit should therefore have abated. 1 Phil. Ev. 482; 15 Mass. Rep. 85; 1 Johns. Ch. R. 370; 1 Vesey, 128; 1 Phil. 497; *King* v. *Laindor*, 8 Term R. 379; 14 Vesey; *Barker* v. *Prentiss*, 6 Mass. R. 431.

2. The assignment being void, the right to the note was still in the bank, whose agent Bayliss was, and therefore the plea of tender was good, because, being the property of the bank, under the statute the defendants have a right to pay in the notes of the bank, even after judgment.

Lucas and *Clapp*, for defendants in error.

The counsel for defendants in error contend that the demurrer was properly sustained in the court below to defendant's pleas.

1. The note sued on could only be attacked by showing that a mistake was made in drawing it, or that there was fraud either in procuring it to be executed or in framing it differently from what was intended. But it could not be shown that the contract was otherwise merely as that the sum expressed to be paid in dollars was to be paid in bank notes. 1 Pirt. Dig. 395, sec. 208; 4 Phil. Ev. Notes, 1460, and references.

2. The frame of the plea of tender was bad. It should have stated that he was ready at the time, and always afterwards, is yet ready, and brings the money into court. The reasons of this form of plea are too obvious, both on principle and authority, to require examination. The effect is to make the specific bank notes tendered ours. Shall he then, by an ingenious evasion of the terms, use the notes, and speculate upon their depreciation or appreciation, as the case may be, and bring them in at the trial worthless for our acceptance? 5 Yerg. R. 414; Peck's Tenn. R. 212.

3. The pleas were bad for duplicity.

Digitized by Google

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of covenant upon a sealed instrument, by which the defendants below, the now plaintiffs in error, promised to pay four months after date to William H. Bayliss, or order, five hundred dollars, with interest from date." It was assigned by Bayliss to Trigg & Chester.

The defendants, besides the plea of payment, filed a special plea, in which it was averred, that the said instrument, though made payable to Bayliss upon its face, was in reality due to the Hernando Bank, and was by agreement to be paid in the bills of said bank, and that on the 16th of November, 1840, they tendered the amount in bills of said bank to the plaintiffs, and that the defendants bring said sum and all interest into court, ready to be paid to said plaintiffs.

A demurrer was filed to this plea. Among the causes assigned were the following: "That the plea does not aver that the defendants were always ready to pay the said bills from the time of the tender," and "that it does not aver the tender was made on the day of the maturity of said instrument." It became due in May, 1840.

Both these objections to the plea are good. The plea must aver a continual state of readiness to pay, or it is bad upon demurrer. Peck. R. 212; 5 Yerg. 414. Although the defendant under such averment may not be able to show its truth, yet its introduction enables the plaintiff to show, if the fact be so, that upon a subsequent demand, the defendant had failed to pay, which would defeat the defence. 5 Yerg. R.

The plaintiffs were entitled to the Hernando Bank bills, taking the plea to be true, on the day the obligation became payable. The same nominal amount six months afterwards, in such bills, might be of much less value. In an action of covenant of this kind, the measure of damages must be the value of the article at the time of the breach, not its value six months afterwards. The rights of the parties become fixed on that day. The demurrer was therefore properly sustained. *Gordon* v. *Parker*, 2 S. & M. 495.

It is said, in argument, that though this might be true at com-

Digitized by Google

mon law, yet that the act of 1840 forbids assignments by banks, and permits payment of debts due to banks to be made under all circumstances in their own issues, and that this varies the common law rule. It may be a matter of much doubt, whether it would be admissible in a court of law, to prove that the obligation did not originally belong to Bayliss, but to the bank. See *Fox* v. *Horah*, 1 Ired. Eq. R.; and *Wilson* v. *Spencer*, 1 Rand. But even if this could be done, the statute directs that after assignment the suit shall *abate* upon the plea of the defendant. This court has decided that the proper mode to make the defence is by plea in abatement. *Planters Bank* v. *Sharp*, 4 S. & M. 17. The parties, therefore, by permitting the suit to be conducted by the plaintiffs as assignees of Bayliss, without question of their character in this particular by proper plea, have admitted their right to sustain the suit in that character. As this was not controverted in the proper mode, it cannot now be reached.

There is no bill of exceptions in the cause, nor was any charge asked of the court, nor any request of leave to amend.

The judgment is affirmed.

Digitized by Google

WILLIAM PETRIE'S EXECUTORS et al. *vs.* DANIEL W. WRIGHT et al.

P. entered into a contract with the Jackson and Brandon Railroad and Bridge Company, by which he agreed to build a bridge over Pearl River, and to construct a turnpike road from the eastern end of the bridge to the termination of the swamp in an eastwardly direction; and the company agreed to pay him $37,500 for the bridge over the river, forty-four cents per cubic yard for making the embankment for the turnpike, and ten dollars per lineal foot for building all necessary bridges between the bridge over the river and the end of the turnpike at the termination of the swamp. Sometime thereafter, P. entered into a contract with the Mississippi and Alabama Railroad Company, to which the Bridge Company were also parties, by which he agreed to construct a railroad, furnish materials, &c. from Jackson to Brandon, and the Railroad Company agreed to pay him therefor $204,000, and an extra sum for excavating rock. In the last contract, there was a clause declaring that the Bridge Company had abandoned their scheme, and that they thereby assigned to the Railroad Company all their rights and privileges under their first contract with P.; but in the last contract it was expressly stipulated, that the building of a bridge over Pearl River should not be included in P.'s obligations to the Railroad Company. *Held*, that the two contracts must be construed together, and that P. was entitled to receive from the Railroad Company the $37,500, forty-four cents per cubic yard for making the embankment, and ten dollars per lineal foot for building bridges, in addition to the $204,000, and the extra sum for excavating rock.

Corporations may contract under their corporate seal, by a vote of the directory entered on the books of the corporation, or by their agents acting within the scope of their authority; and binding contracts may be implied from their corporate acts, without either a vote, deed or writing.

W. P. contracted with the Mississippi and Alabama Railroad Company to build a railroad, furnish materials, an engine, &c., for which the company were to pay him a stipulated sum, a portion of which was to be advanced to enable him to purchase slaves to work on the road; and he was to execute to the company a mortgage on the slaves so purchased, as a security for the diligent and faithful performance of his duties on the road. They advanced the money, and he purchased the slaves and executed the mortgage. The company afterwards, to wit, on the 21st day of December, 1839, and before the road was completed, adopted several resolutions, by the first of which

Digitized by Google

they released W. P. from his obligation to furnish an engine; by the second they directed his mortgage to be cancelled; and by the third, after admitting in a preamble that they had failed to supply him with par funds, they requested that he should proceed to finish the road at his own expense, and retain it until he should be repaid by the profits. They subsequently agreed that F. H. P. should be substituted as a contractor in the place of W. P., and that they would give him $15,000 to complete the road; W. P. at the same time gave to the company his verbal promise, that F. H. P. should finish the road. F. H. P. then, with the knowledge of the company, proceeded to work on the road, and continued to work on it for some time, though he never finished it. *Held*, that the resolutions, by substituting new terms and conditions inconsistent with the original agreement, amounted to an abandonment of the contract with W. P., and when taken in connection with the other circumstances and facts of the case, must be considered as a settlement of the balances between W. P. and themselves; and as a legal consequence, to a discharge of him from all obligations or liability to them, on account of his contract or mortgage.

Fraud may sometimes be established by strong circumstantial evidence, even against positive proof denying it.

A voluntary release of securities held by a corporation, is void as to creditors; yet if, in the settlement of mutual and conflicting claims, a corporation allow a debtor more than he is strictly entitled to, that is not of itself a fraud; there must be some device to injure others, or the act must be so grossly extravagant and wasteful, as to amount to fraud in law.

P. contracted with the Mississippi and Alabama Railroad Company to build a railroad from Jackson to Brandon, for which he was to receive about $281,000; the money to be paid from time to time, as P. in the construction of the road might, in his own opinion, require it. The company failed to keep him supplied with par funds, and after paying him $298,026, most of which was in depreciated bank paper, they released him from the further prosecution of the road, and cancelled the mortgage he had given them for the diligent and faithful performance of the work on the road. When this release was given and the mortgage cancelled, P. claimed large damages against the company for their failure to comply with their contract; they refused to allow him the whole amount claimed, but they allowed him a part of it, and a final settlement took place between them. P., in his answer, stated, and several witnesses proved, that the settlement was fair, and made in good faith. *Held*, that even though P. may have received more than he was strictly entitled to, the settlement was not only binding on the company, but was legal and valid as against their creditors.

Where a complainant, in addition to the general allegations in his bill, propounds special interrogatories to the defendant, the direct answers of the defendant to such interrogatories, are evidence for as well as against him, and

Digitized by Google

will be conclusive unless shown to be false; nor will any presumption be indulged against such evidence on account of its being furnished by a party interested.

Where a party agrees to make a security in future, that is construed in equity as an equitable mortgage; but the equitable mortgage becomes merged whenever a mortgage is executed according to the agreement of the parties.

P. gave a mortgage to a railroad company, as a security for the performance of certain work, and the chancellor rendered a decree of foreclosure of the mortgage for a balance found to be due by P. to the company, on an account stated between them: *Held*, that the mortgage being a mere security for the performance of work, and not for the payment of a debt, the decree was erroneous.

On appeal, from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

Daniel W. Wright and others, who were partners, doing business under the name and firm of the "Real Estate and Banking Company of Columbus, Mississippi," and Richard T. Hoskins, filed their bill in the superior court of chancery, alleging that the said partners, under their partnership name, at the November term, 1839, of the circuit court of Rankin county, recovered two judgments against the "Mississippi and Alabama Railroad Company," the one for the sum of $130,446 73, besides costs, and the other for the sum of $19,943 90, on which numerous executions have been issued. Certified transcripts of the judgments and executions are exhibited with the bill; that in the month of November, 1839, the said firm assigned all their effects, including said judgments, to the said Richard T. Hoskins, by deed duly acknowledged and recorded in the county of Lowndes, a certified copy of which is also exhibited with the bill. In June, 1840, executions were issued on said judgments, and placed in the hands of the sheriffs of Rankin and Hinds county; the former levied on thirty-eight, and the latter on forty-one negroes, as the property of the "Mississippi and Alabama Railroad Company," all of which were claimed by William Petrie, who made oath and gave bonds to try the right of property according to the statute. The bill charges that the claim of Petrie is without foundation in equity or justice, but is founded in fraud, complex in its nature, well contrived to defeat

Digitized by Google

the ends of justice in a trial at law, and too artfully framed and guarded to be successfully sifted and exposed, except in a court of chancery; that William H. Shelton, Samuel M. Puckett, Robert G. Crozier, Richard M. Hobson, John W. King, Henry K. Moss, and Thomas J. Coffee, were stockholders in, and the acting managers and directors of, the said railroad company, and by them alone could the interests and property of the company be protected and secured to answer the trusts growing out of the law of its incorporation; that the said directors were faithless to the charge confided to them, and used the said corporation as an instrument of amassing large amounts of property, of which the negroes levied on as above stated, form a part, and were colleagued with divers persons, of whom William Petrie was one, for the purpose of creating false claims, titles and ownerships to and of the property thus amassed, that they might abstract the same from the said company, defraud the creditors thereof out of it, and appropriate it to their own use; that said directors, instead of being interested in behalf of said company, to have justice done in a trial at law of the issue sought to be made up by said Petrie as aforesaid, are colluding with Petrie to defeat the title of the company; that they have caused some of the books of the company to be taken out of the state of Mississippi, and have so mutilated and altered others, as to destroy the evidence they contained of the numerous frauds practised by themselves, said Petrie, and their other confederates, and make them sustain the fraudulent claim of Petrie to the negroes above-mentioned; that Shelton and Petrie have used their influence over several of the most important witnesses in behalf of complainants on the trial of the right of property, to leave the state, so that their testimony could not be procured in time, if at all, for the circuit court of Rankin county, then in session. The bill further charges, that it was the settled policy of the directors of said company, from its commencement, to use the company as the means of getting into their possession large amounts of property, and hold the same in their own and in the names of their confederates, and in that manner protect it from the just claims of the creditors of the company, and finally divide it

Digitized by Google

amongst themselves and their confederates; that the said directors, out of the means of the company, had provided themselves with large estates in lands, negroes and other property, and had besides taken eighty or ninety thousand dollars, and deposited it in some bank in the city of Philadelphia, in the name of one of themselves, and then transferred the same to the credit of the Bank of Lexington, for the purpose of evading the claims of attaching creditors of the said railroad company, and ultimately of dividing it amongst themselves; and that they have been for some time in said city to effect that object. The bill further charges, that about one hundred and forty negroes, including those levied on as above stated, which cost $159,000; a large number of horses and oxen, which cost $12,400; a large number of wagons, carts and tools, which cost $25,000; a steam sawmill, which cost $25,000; and a large quantity of railroad iron, which cost $25,000 or $30,000, were all purchased with the funds of the said company, and were by the fraudulent contrivances of the said directors and Petrie, subjected to the claim of Petrie, that they might through him and his claims, defraud the company and their creditors out of the whole of said property, and eventually divide it between Petrie and themselves; that Petrie bases his claim to said negroes and other property on certain articles of agreement entered into between said company and himself, a copy of which is exhibited with the bill, and is in the following words, to wit:

"Articles of agreement made and concluded this 23d day of February, A. D. 1837, between the Mississippi and Alabama Railroad Company, by William H. Shelton, the president thereof, and the Jackson and Brandon Railroad and Bridge Company, by Henry K. Moss, the president thereof, of the first part, and William Petrie, of the county of Rankin, state of Mississippi, of the second part, witnesseth: That the said William Petrie, for himself, his heirs and assigns, agrees to perform all the grubbing, clearing and chopping, making excavations, embankments, bridging drains and culverts, necessary to complete the graduation of the Mississippi and Alabama Railroad from the

Digitized by Google

depot lot in the town of Jackson, donated by the legislature to the Jackson and Brandon Railroad and Bridge Company, to the western bank of Pearl river, contracted to be built by the Jackson and Brandon Railroad and Bridge Company, by articles bearing date herewith, to the ravine in the western part of the town of Brandon; also, to furnish all materials, including iron plate, spikes, and connecting plates, and put down the whole of the superstructure, with the necessary turnouts, turning platforms, side roads at the depots, water stations, road crossings, and all other incidental work that may be necessary to render the Railroad complete in every respect; to build a warehouse at the termination in Brandon, the dimensions to be 35 by 60 feet, and an engine house; also, to furnish a locomotive engine and tender of the most approved construction, and eight cars, one of which shall be a forty-passenger car, and put the railroad in full operation. *Provided*, however, that this instrument, nor any part of it shall be so construed or understood as including the building of the bridge over Pearl river; and provided also, if there should be rock encountered in excavating through the ridge near the depot place in Brandon, that the party of the second part shall be paid for any such rock at an extra price not exceeding two dollars per cubic yard. It is the understanding of said parties that the railroad way shall be graduated twelve feet wide where embankments occur, and fourteen feet wide in excavations, so as to allow a sufficient width for drains on the sides, excepting at the depots and turnouts, where the width will be increased as much as necessary. The superstructure to be composed of ties of oak, to rest on plank at each end, with grooves cut out four and a half inches deep to receive the wood rails, which will be firmly keyed to its place with white oak wedges, the whole to be surmounted by an iron plate rail two inches wide by a half inch in thickness secured to the under rail by five inch wrought spikes, ragged at the points, and underlaid at the joints with connecting plates of zinc or iron. And whereas the president and directors of the Jackson and Brandon Railroad and Bridge Company, having abandoned the scheme of connecting that portion of the railroad extending

Digitized by Google

from the depot at Jackson to the ravine aforesaid, in consideration whereof, the said president and directors do hereby covenant to and with the president and directors of the Mississippi and Alabama Railroad Company, that they will and do hereby release and convey unto the said president and directors of the Mississippi and Alabama Railroad Company for the time being and their successors in office, to the entire use and benefit of said company, all claim which the said president and directors of the Jackson and Brandon Railroad and Bridge Company have or may hereafter have unto the lands, lumber, stone, dirt, &c., on the tract heretofore allotted for said road of said Company, and to every right and privilege extended to them by the original owners of the lands. And the said president and directors of the said Mississippi and Alabama Railroad Company, do hereby contract with the said Petrie, to construct the railroad aforesaid from the points aforesaid, and in the manner and form aforesaid; in consideration of which said covenants and agreements on the part of the said William Petrie, the said Mississippi and Alabama Railroad Company, parties of the first part, hereby promise and agree to pay to the party of the second part, the sum of two hundred and four thousand dollars, the first payment of twenty thousand dollars to be made within one month of the commencement of the work, and then payments to be made at intervals of about thirty days, as the money may be required for the prosecution of the contract, and for the purchase of the iron and the engine, of which the party of the second part shall determine. It is the understanding of both parties, that besides the above mentioned terms of payment, the parties of the first part shall, at the expiration of thirty days from the date hereof, invest the party of the second part with authority to draw bills of exchange on the Bank of Mississippi and Alabama Railroad Company at Brandon, to the amount of one hundred thousand dollars, in the following manner, to wit: Twenty thousand dollars at four months after date, twenty thousand dollars at six months, twenty thousand dollars at eight months, twenty thousand dollars at ten months, and twenty

Digitized by Google

thousand dollars at twelve months after date. It is further understood by the parties, that the party of the second part shall apply the above mentioned one hundred thousand dollars, (or letters of credit to that amount,) to the purchase of slaves to work on the railroad, which slaves with all other property in possession of the party of the second part, shall be mortgaged to the parties of the first part as security for the faithful performance of this contract. It is further understood by said parties, that this contract shall be commenced within one month, and completed in two years from the date thereof, and if the party of the second part complete it before the expiration of said two years, he shall have the right to retain it in possession with its appurtenances, and derive the profits arising from the transportation of passengers and freight during such time till this contract expires; the party of the second part shall also have the right to all timber that it may become necessary to clear off for the roadway, and he shall keep the railroad and machinery in repair, and deliver them to the party of the first part in full and complete operation at the expiration of the contract. It is further understood by the parties, that if the party of the second part shall prove negligent, and fail to use due diligence and energy in the prosecution of this contract, or for any other reason shall not perform the same in a manner to give assurance that it will be accomplished by the time specified, the president of said company shall have power to declare this contract abandoned, and that such declaration shall exonerate the parties of the first part from every obligation thence arising, and they may immediately thereafter proceed to re-let the work as freely and fully as if this contract had never existed; and the party of the second part shall be liable to pay to the parties of the first part, such damages as may be sustained by reason of such failure or non performance. It is agreed by the parties, that if any dispute or misunderstanding shall arise as to the meaning or execution of the provisions of this instrument, then it shall be referred to some competent persons to be selected jointly by the parties, and that his or their decision shall be final and binding on both parties. In testimony whereof, the

Digitized by Google

said parties have hereunto affixed their hands and seals, the day and year first above written.

WILLIAM H. SHELTON, [L. S.]
Pres. Miss. and Ala. R. R. Co.
H. K. MOSS, [L. S.]
Pres. Jackson and Brandon R. R. and B. Co.
WM. PETRIE." [L. S.]

The bill then charges that at the time Petrie entered into said contract, he was in a state of absolute poverty, and yet in three months from that time he claimed to be the owner of negroes which cost $159,000, instead of $100,000, the amount to be invested in negroes according to the agreement, and various horses, oxen, wagons, carts, tools, saw mills, railroad iron, &c., which with the negroes, cost at least $226,000, all of which were purchased with the funds of the company; that Petrie had not paid out a dollar of his own money in the purchase of the negroes and other property, nor did he owe a dollar on account of them to the said company, nor any one else. It is further charged that the said company paid Petrie at least four hundred and forty-two thousand seven hundred and fifty-five dollars on account of said railroad, or the sum of two hundred and thirty-eight thousand seven hundred and fifty-five dollars more than they stipulated to give him; that notwithstanding said Petrie had received more than double as much as he was entitled to, he has not completed any part of the railroad; the superstructure is under wooden rails only put down in part, no iron plate rails have been laid, no turnouts, turning platforms, side roads at the depots, water stations, road crossings have been made, no depots nor warehouse built, no locomotive engine nor tender, nor cars procured; but that Petrie, after superintending the road for about two years, during which time he received a salary of $4500 per year in addition to the sums above mentioned, abandoned it not half finished, in a ruinous and worthless condition, and removed said negroes and other property to cotton farms, and has since been engaged in raising cotton instead of building said road. The bill further charges that in

Digitized by Google

the fall of 1838, when the bank commissioners of the State of Mississippi were about to examine the said Mississippi and Alabama Railroad Company, said Petrie addressed a written communication to William H. Shelton, the president of said company, which is exhibited with the bill, and is in the following words, to wit:

"*Railroad Office, August 2d*, 1838.

COL. W. H. SHELTON, *Pres. &c.*

SIR: In accordance with your request of yesterday I make the following statement of the amount of money expended in the construction of the railroad between Jackson and Brandon, the bridge over Pearl river, and the turnpike road and bridges through the swamp, to wit:

For slaves purchased,	$159,000
Horses and oxen,	12,400
Wagons, carts and tools,	5,000
Erecting a saw mill and fixtures for sawing lumber for constructing the bridge and road superstructure,	25,000
Wages of managers and physicians,	9,000
Do. of masons for work on abutments,	1,660
Do. of laborers on turnpike road,	2,975
Subsistence,	23,500
	$239,035

The principal items of work done consist in grubbing and clearing twelve miles of the road, and in grading six and a half miles ready to receive the superstructure. Also, in hewing ten thousand cubic feet of lumber for railroad bridges, and preparing a portion of the superstructure of the road. The materials prepared and labor done on the bridge over Pearl river, and the turnpike and bridges through the swamp amount to $56,000.

Respectfully submitted,

W. PETRIE."

"*Memorandum.* Mr. Petrie received from Rankin county

Digitized by Google

an appropriation towards the turnpike, which makes the expenditures larger than the bank advances."

The bill further charges that, when said company apprehended no danger from creditors, and wished to increase its credit, impose upon the community, and extend its operations, the said negroes and other property were rightfully declared to be the property of the company; but when creditors beset them, and there was danger of the negroes being seized on to pay debts, then the claim of Petrie would be set up, as the claim of the Bank of Lexington had been set up to the said fund in Philadelphia, to defraud the creditors of the company. That by the terms of said agreement Petrie was to execute a mortgage on said negroes and other property, to secure the diligent and faithful performance on his part of said contract; that he never executed said mortgage, but that equity will consider as done that which ought to have been done; and that, by the conditions of the mortgage which thus exists in equity, the title to said negroes and property has become absolute in said company, by said Petrie failing to comply with the terms of said contract; that Petrie and the company ought to be made to account together, under the superintendence of the court of chancery; the amount due by Petrie to the company ascertained; the mortgage foreclosed, and the negroes and other property sold for the payment of the judgments in favor of complainants. The bill also charges that, notwithstanding Petrie has failed to comply with his contract, and has abandoned said road, in an unfinished and worthless condition, the company fraudulently refuse to declare said contract cancelled, or to re-let said road. It therefore charges that said contract should be rescinded, and the negroes and property remain with the company for the payment of its debts; that besides the negroes above levied on, there are others which ought also to be embraced in said equitable mortgage, and sold for the payment of the judgments due the complainants. The bill charges that William H. Washington is a stockholder, and was at one time a director in said company, and that he possessed important

Digitized by Google

information relative to the actings and doings of the above-named directors and Petrie, and prays that he may be made a defendant; that Frederick H. Petrie claims some interest in some of said negroes, under a conveyance made by William Petrie, in 1840, and that he has, as agent of William Petrie, some of the negroes and other property in possession; that complainants are afraid and believe that William Petrie, Frederick H. Petrie, or some of the said directors, will sell, remove, or otherwise dispose of said negroes, &c., so as to put them beyond the jurisdiction and reach of the chancery court. The said directors, William Petrie, Frederick H. Petrie, William R. Crane, and John T. Blow, (the two last named persons having been appointed by the governor of Mississippi commissioners to take charge of the effects and settle up the affairs of said company,) and William H. Washington, are made defendants.

In addition to the foregoing general allegations there are thirty-one special interrogatories propounded to the defendants, all of which they are required to answer fully. They were called on to state whether they had ever been connected with the Mississippi and Alabama Railroad Company, as president, director, stockholder, agent, engineer, or in any other capacity; when their connection commenced and ended; whether the company was ever engaged in building a railroad from Jackson to Brandon; at what time it was begun, how long it was worked on, and what progress was made towards the completion of it; whether William Petrie was ever employed by said company as engineer, overseer, or in any other character on said road; when he commenced, and when he ceased to work on it; whether the company abandoned the road, and why; have they discharged William Petrie, and when; have they had a final settlement with him; when it took place, how much he owed them on such settlement; have they released him, and when and why; how much they paid him; whether the said negroes and other property were purchased with the funds of the company; and were they, at the time they were purchased, considered the property of the company, or of Petrie; does Petrie now owe the company anything, and how much. And numerous other

Digitized by Google

questions, all pertaining to the nature of the contract between the company and Petrie; the understanding of the parties at the time it was entered into; the manner in which it had been executed, and the final settlement with, and release of Petrie, &c.

On the 15th day of September, 1841, William Petrie filed his answer, in which he admits that the Real Estate Banking Company of Columbus recovered judgments against the Mississippi and Alabama Railroad Company, as charged in the bill, states that he knows nothing of the assignment of such judgments to the said Hoskins, and without either admitting or denying it, requires proof, if the fact be deemed material; he admits the issuance and levy of the executions, the giving bond to try the right of property, and that the property was left in his possession, as stated by the complainants; he denies that his claim is founded in fraud, either simple or complex; insists that it is legal and equitable, and he is willing to test the justice of it in any court legal or equitable, in the state; says that when the negroes were first levied on he filed his bill in the superior court of chancery, for an injunction, and thereby evinced his willingness to submit his claim to the scrutiny and test of that court; and it was only after the chancellor had decided that he could not order the negroes levied on to be delivered up, that he gave the bond to try the right of property, and that was the only course, as he believed, by which he got possession of the negroes. He admits that Shelton, Puckett, Crozier, King, Hobson, Moss, and Coffee, were for some time directors of the Mississippi and Alabama Railroad Company. He does not know whether said directors colleagued with others to obtain large amounts of property fraudulently, by using the company for their own purposes, or not; and, if material, he requires proof. He denies that he ever colleagued with said directors for any of the fraudulent purposes charged in the bill. He also denies that his claim to said negroes was got up for the purpose of defeating the claims of the creditors of said complainant, or that his claim is of the fraudulent character set out in the bill. He denies that said directors have any title to the negroes claimed by him. Says they are his property, not sub-

Digitized by Google

ject to the control of said directors, nor to the claim of said directors, or the company, or of any other person, in law or equity. He says it is untrue that said directors had colluded with him in any manner to defeat the claim of the Mississippi and Alabama Railroad Company, or to sustain his claim to the property, on the trial of the issue at law. He does not know whether the directors have removed, or destroyed, or mutilated the books of said company, or whether, by such means, they have destroyed any evidence of their actings and doings. If such things have been done, it was without his approbation; and, if material, he requires proof. Though, if any such thing was done, it was not done with the view to secrete, or hide, or remove, or destroy the evidence of the dealings of the company with him. The books never did contain any evidence of any fraudulent dealings with him, for the purpose mentioned in the bill, or any other purpose. Nor have said books ever been altered or changed for him, or at his request or with his knowledge, in order to make them evidence for or against said company; the books never were under his control or direction, and he denies that they were ever removed, or destroyed, or mutilated, with his knowledge, at his suggestion, or for his interest. Whatever frauds or misdeeds said directors may have committed, he leaves to them to answer for; he has never been and never expects to be benefited by any of them. He says it is untrue that he ever used any influence over any witness, or in any way procured the absence of any witness, so as to defeat any testimony which they could give at law; and if Shelton ever did, it was not within his knowledge. He does not know what motives or policy influenced the directors in the management of said corporation, nor does he know whether they have acquired large estates from said corporation. He knows nothing of the $90,000 said to be deposited in Philadelphia. He had no interest in that or any other appropriation by said directors, and had no participation in it, if any such there was. He neither admits or denies any fraudulent conduct or management of said directors, except so far as such frauds are charged to have been done with his connivance, at his instance or for his benefit, and

Digitized by Google

in relation to his business with said company, and all such he denies. It is not true that the negroes levied upon, or any other species of property, of any of the different kinds mentioned in the bill, have, by any fraudulent contrivance, been subjected to the claim of the respondent, for the purpose of defrauding the Mississippi and Alabama Railroad Company, or her creditors, in order that the same might be divided between respondent and said directors. It is true, that he bases his claim to said slaves upon means and facilities afforded him by said company by virtue of the agreement referred to in the bill. The agreement or contract was made under these circumstances: Prior to the incorporation of the Mississippi and Alabama Railroad Company, there was another corporation in existence called the Jackson and Brandon Railroad and Bridge Company, established to erect a bridge over Pearl river and a railroad from Jackson to Brandon, and of which he had for some time acted as the agent and engineer; and they were indebted to him in the sum of about six thousand dollars for his services; which sum the Mississippi and Alabama Railroad Company agreed to pay him in addition to the sums mentioned in his agreement with the Railroad and Bridge Company, which agreement was in the following words, to wit:

"Articles of agreement made and concluded the 23d day of February, 1837, by and between the Jackson and Brandon Railroad and Bridge Company, by H. K. Moss, the president thereof, of the one part, and W. Petrie, now of the county of Rankin and state of Mississippi, of the other or second part; Witnesseth, for himself, his heirs and assigns, agrees to furnish all materials and construct a bridge over Pearl river, and extend the same over the slough and low ground near said river, as far as it will be necessary to accommodate the travel of the country; and in consideration of which the party of the first part hereby promises and agrees to pay to the party of the second part the sum of $37,500. The first payment to be made within one month from the commencement of the work, the others at intervals of about thirty days, in sums proportioned to

Digitized by Google

the whole amount agreed upon, to enable the party of the second part to progress with the job; and when the bridge shall be finished, he shall receive the balance due him on a final settlement. The said party of the second part also agrees to construct a road from the termination of the bridge in an eastwardly direction to the edge of the swamp, and build any bridges that may be considered necessary between those two points, by the party of the first part. And in consideration of which the party of the first part hereby promises and agrees to pay to the party of the second part as soon as said road is done, at the following rates, viz.: for embanking the road, forty-four cents per cubic yard; for bridging, if any be required, ten dollars per foot lineal of the bridges. It is the understanding of said parties, that the bridge over Pearl river shall be sufficiently elevated so as not to interrupt the free navigation of said river. The pier and abutments to be of hard burnt bricks, laid in lime mortar and covered with hydraulic cement. The superstructure shall be built on Town's patent lattice plan, with two tracts, one to accommodate the common travel of the country, the other for the railroad, to be covered in and painted, and the whole structure shall be finished in the most substantial and workmanlike manner. The extension over the slough to the county road, shall be of piling or trestle-work, so managed as to render it substantial and firm; the road-way to be of 2½-inch plank, and finished with a neat railing on the sides. It is also understood by said parties that this contract shall be commenced in thirty days from date, and finished by the first day of May, 1838; but that the party of the second part shall have the right to retain the road and bridge in possession, and receive the profits arising from the tolls, till the 23d day of February, 1839, during which time he shall keep them in repair; and at the expiration, deliver them to the party of the first part in a perfect condition. It is further understood by said parties, that if the party of the second part shall prove negligent, fail to use due diligence and energy in the prosecution of said contract, or for any other reason shall not perform the same in a manner to give assurance that it will be accomplished by the time specified, that the president of said company shall have power

Digitized by Google

to declare said contract abandoned, and that such declaration shall exonerate the party of the first part from every obligation thence arising, and that they may immediately thereafter proceed to re-let this work as freely and fully as if this contract had never existed; and the party of the second part shall be liable to pay to the party of the first part any damages that may be sustained by reason of such failure or non-performance. It is agreed by said parties, if any dispute or misunderstanding should arise as to the meaning or execution of this instrument, it shall be referred to some competent person or persons selected by the parties, and his or their decision shall be final and binding upon both. In testimony whereof, the said parties have hereunto set their hands and affixed their seals the day and year first above written.

"H. K. Moss, (L. S.)
Pres. Jackson and Brandon R. and B. Co.
"W. PETRIE." (L. S.)

After the incorporation of the Mississippi and Alabama Railroad Company, the stockholders in the other company agreed to surrender to them, the Mississippi and Alabama Railroad Company, all their privileges of constructing a railroad, and upon making this agreement the Mississippi and Alabama Railroad Company wished to employ respondent as an engineer in the construction of the road, but he refused to be employed in any other capacity than that of independent builder and contractor, in which capacity he was willing to undertake the completion of the work by a particular time for a given sum. Whereupon the agreement was entered into which is exhibited with the complainant's bill. By that agreement it will be seen that he was to receive $204,000, with the additional sum of two dollars per cubic foot for excavating rock. The number of yards of rock excavated was 2292, which at the price agreed upon amounted to $1,584. By the contract with the Bridge Company, he was to receive $37,500 for building the bridge over Pearl river, forty-four cents per cubic yard for making the embankment for the turnpike from the end of the bridge to the highlands, and

Digitized by Google

ten dollars per lineal foot for building the bridges on the turnpike. He made 39,567 cubic yards of embankment, which was worth $17,409 48; and 1203 lineal feet of bridging, which was worth $12.030, making together the sum of $66,939 48; all of which the Mississippi and Alabama Railroad Company, having taken the place of the Jackson and Brandon Railroad and Bridge Company, assumed to pay, which amount added to the $204,000 and $1,584 above mentioned, made the sum of $275,000, which the Mississippi and Alabama Railroad Company were to pay respondent on the two contracts, besides the sum of six thousand dollars which they had assumed to pay for his services as engineer, as above mentioned.

The stipulation in the agreement relative to the investment of $100,000 in negroes was made because he thought that with the negroes purchased he could do the work, make them pay for themselves, and have them as his own property at the completion of the contract, when if he had hired laborers he would have been compelled to pay them high prices, and he would have had but a few thousand dollars left at the completion of the contract, as profit. The sum of $100,000 dollars was advanced to him, and he purchased negroes with it, and placed them on the road according to the agreement. The further sum of thirty-six thousand dollars, or thereabouts was furnished him and invested in slaves, which, by agreement with the company, he also placed as laborers on the road. This last sum of $36,000 was paid on his contract, for work which he had done and was willing to do. None of the slaves were purchased for the company or any of the directors, nor did the company or any of the directors have any interest or title in them; further than a mortgage on those bought with the $100,000, to secure the faithful performance of his contract, but subject to the right to bar said mortgage, the slaves were his. He did not fail to comply with the agreement to give said mortgage. But soon after the purchase of the slaves, he did execute a mortgage on eighty-one slaves which had cost $95,000. The mortgages so executed were never by said company recorded, though that was not through or by the agency of respondent, but he sup-

Digitized by Google

poses by the negligence of the company. The mortgages were cancelled at the settlement hereafter stated. He was always ready to execute any mortgage, or give any pledge required by the agreement to secure the performance of his contract. He files with his answer bills of sale, which will show the negroes purchased, their description, the time when purchased, &c. It is not true that he erected a saw-mill with the funds of said company, for which they paid $25,000. He did erect a saw-mill, however, which cost him about $7,000 in cash, besides the labor of his hands; in estimating this labor he put down the labor of negroes at $40 per month, and in this manner the estimate of the saw-mill of $25,000 was obtained. The $7,000 was paid by said company under the contract, but neither the company nor the directors have any right or control over the said mill, the same being the sole property of respondent, built by him to facilitate him in procuring lumber for the road, &c. The oxen, horses and mules purchased to work on the road cost him $12,000 or $13,000; when bought they were his sole property. The money with which they were purchased he received from the company on the contract, which they were bound to pay him. He also purchased tools, perhaps to the amount of $5,000 to be used on said railroad. These were purchased in the same way as the other property, and were his. The horses, &c., have been mostly worn out or destroyed on the road. The railroad iron did not cost $30,000 or $35,000, but with the freight cost about $15,000 or $20,000, and is now attached by the creditors of the company in New Orleans. Respondent claimed it as his property, because the company were to have furnished him the money with which to buy it, which they could not do, and having funds in Liverpool, they ordered said iron to be bought and shipped to respondent, and respondent was advised that he had a right to the iron, and to its control, in order to perform his contract, but he never claimed it in any other manner. His claim he still urges for the purpose of laying the iron on the road, which the brother of respondent has agreed to finish. Respondent files with his answer an account current, showing that he had received of the company $298,021 81, the greater

Digitized by Google

part of which was in the notes of the company, and at a discount at the time he received it, and he had often to use it at a great loss, by which his expenses on the road were much increased. At the time respondent received the $125,000, in Brandon money, mentioned in his account, the company were considerably in arrear, and had no other means with which to pay than in that manner, and for the purpose of finishing the road he agreed to receive it. So far from said company having overpaid him, on the 21st day of December, 1839, when a settlement took place, they were considerably in his debt. From the first the company did not comply with their engagements, and they thereby considerably enhanced the cost of making the road, for which he believed in equity he was entitled to remuneration. When the settlement took place he claimed this remuneration, but the directors were unwilling to allow it, and at last a compromise was effected, by which respondent was discharged from any further connection with the road, the agreement rescinded and the mortgages cancelled; the road, so far as done, was received in satisfaction of his part of the contract, and the company discharged from further payments to him. This settlement was made after some delay and difficulty, in the presence and by the advice of counsel employed by the company; it was fairly made, without any design to deceive or defraud any one, and without any claim or pretence of claim by the company, or any one, to the property aforesaid. He files with his answer an account of the additional expense claimed, which is in the following words, to wit:

"An approximate estimate of the enhanced cost of constructing the Jackson and Brandon Railroad, Turnpike and Bridge, on account of the failure of the company to comply with their engagements." "Had funds been furnished in July, 1837, as requested, for the purchase of iron, engine and cars, the railroad and bridge could have been finished at least one year ago, and the stock for sawing lumber could have been conveyed on the railroad by the aid of the engine; also, all the materials for constructing the railroad and bridge could have been conveyed in the same manner, which would have saved the expense of eighty-

Digitized by Google

five horses and oxen, which estimated at 75 cents per day, say 300 days, amounts to	$19,125 00
And twelve drivers to attend to same, at $45 per month, 12 months, is	6,480 00
Also, extra time of three managers one year, at $1500 each, ...	4,500 00
Loss by being obliged to anticipate the par funds that were voted me by the directory, which were not furnished at the time specified, thereby obliging me to purchase on a credit, at advanced prices, the necessaries for prosecuting the work, say 10 per cent. on $40,000, .	4,000 00
Loss on $260,000 Brandon money, depreciated 15 per cent., ...	39,000 00
Had I received the iron the bridge could have been built eight months before my contract expired, and I should probably have received in tolls on the bridge and turnpike road . .	5,000 00
Detriment to myself by detention here, say one year at least, and consequent prevention from entering into any profitable "engagement that might have offered, say"	7,500 00
	"$85,605 00"

He denies that he was destitute and in poverty when he made said contract; he thinks his property was worth $20,000; he possessed character in his profession of civil engineer, and had never given any one cause to complain of his want of punctuality. He denies that he failed to comply with his contract; he has always been, and still is willing to perform his part of it whenever the company places it in his power to do so. He commenced work on the road soon after the 23d day of February, 1837, and continued to work on it until the 21st day of December, 1839, and during the whole time he was continually hindered by the inability of the company to furnish him funds according to their contract; that by their failure to furnish him money to buy iron, &c., and by the iron purchased for him being

Digitized by Google

attached in New Orleans, and particularly by the inability of the company to procure the right of way, respondent could not finish the road. Respondent has a suit now pending against him for damages in constructing the road over the land of Gardner, and for cutting down timber for that purpose. If the company had complied with their contract, he would have easily finished the road within the time specified. When respondent ceased to work on the road on the 21st December, 1839, his brother employed respondent's force on it from that time till the 28th April, 1840, when he had to quit for the want of the right of way and of the iron. At the time his brother, F. H. Petrie, withdrew the force from the road, he could have had it in operation in six or eight weeks, if the right of way could have been procured, and the iron could have been had; and it was not till it was manifest that these obstacles could not be removed, that the hands were withdrawn from the road. It is not true that he abandoned the road not half finished, in a ruinous and worthless condition; on the contrary, the whole of the work is nearly completed, none of it except the grading however, is actually finished. The wood rails are laid except about three-fourths of a mile. The iron is not laid for the reason before stated. The turnouts, turning platforms, side roads, crossings, water stations, &c. are the last work usually done on such roads, and the expense for making them would be very small. The materials are all ready for the ware and engine houses, and they are not erected because the principal cost of them would be the transportation of the materials from the swamp of Pearl river; whereas, if the road was done, the cost would be light; nor is there any necessity for such houses until the road is done. A locomotive and tender were built for the road in Philadelphia, but were not sent on because the company did not furnish the par funds to pay for them; and the same is true as to the cars. Such was the situation of the road at the time of his settlement with the company. He brought them considerably in debt by his account for damages. The directors, however, were unwilling to allow all his charges, and proposed a compromise, which was finally acceded to as stated above, and respondent's brother

Digitized by Google

then agreed to finish the road for $15,000. The estimate of $226,000 placed upon the property of respondent, is far more than it is worth. At the time the executions were levied, the whole of his property was not worth more than $80,000, though it cost more than that sum. The whole of said property, except what was owned by respondent at the time of his contract with the company, was not paid for with money advanced by the company, but a part of it was paid for with money borrowed from his brother, and other parts with money otherwise made. It is not true that he never paid the company anything for the money advanced to him. He made a contract with the company to do certain work, for which he was to be paid a specific price. He has performed his part of the contract as far as he could, and the company have failed to perform theirs, and he has thereby sustained a great loss. That the road has not been completed is no fault of his, but is the fault of the company, as they well knew and admitted at the time of the settlement aforesaid. But he is advised, if he had failed to perform his part of the contract, it was competent for the company to release him, and no one else had a right to complain. He files as an exhibit to his answer, resolutions passed by the directors of said company on the 21st day of December, 1839; by which they directed his mortgages to be cancelled, and admitted their inability to furnish the funds they were bound to furnish for the completion of the road, which resolutions are in these words, to wit:

"*Resolved*, That William Petrie be, and he is hereby released from that portion of his contract, for the construction of the railroad, in which he has obligated himself to furnish a locomotive engine for the same, and that seven thousand dollars, the estimated price, be passed to his credit.

"*Be it further resolved*, That the cashier be required to cancel the mortgage given by said Petrie to this company, now remaining on record on the books of this bank.

"Whereas, this company are under obligation to furnish William Petrie, contractor of the railroad, a certain amount of par funds, to enable him to complete the road, and this bank being unable to furnish said funds, therefore

Digitized by Google

"*Resolved*, That the said Petrie be, and he is hereby requested to prosecute said road to completion at his own expense, and that he retain the use of it until the profits arising therefrom shall be sufficient to pay him such balance as this company may owe him after the completion of said road."

"The above is a true copy from the minutes.

"R. G. CROZIER, *Cashier*."

Respondent admits he wrote the letter exhibited with the complainant's bill, but denies that he represented the property to belong to the company; he made the estimate to enable the company to show the general manner in which they had laid out their funds, and the extent to which the same had been applied on the road. That was a rough estimate, and not precisely correct; the amount laid out by him in negroes was only about $136,000, instead of $159,000, as stated in that letter; he not only never admitted that said slaves belonged to the company, but he uniformly claimed them as his own. After the settlement and compromise with the company, he obtained possession of his mortgages by letter from the cashier, and he exhibits with his answer the letter and mortgages. He avers that all the slaves he ever purchased with the money advanced to him by the company, were levied on by said executions in favor of complainants. At any rate, he files with his answer a list of all that were ever so purchased by him. He admits he received other sums of money from the company, which he invested in slaves; he also often borrowed of his brother, F. H. Petrie, considerable sums of money, which he still owes, and invested it in slaves or applied it to the road; and he also made other sums of money by trading, &c., with which he bought slaves or used it on the road. And he files with his answer a list of all the slaves he ever bought, all of which, except such as have died, ran away, or been sold, are still in his possession. He repeats that before his final settlement with the company, he was at all times ready and willing to mortgage any or all of his property to secure the performance of his contract. His contract had never been declared forfeited by the company, nor the work

Digitized by Google

re-let, because the company, and not he, were in default. He admits that Blow and Crane were appointed commissioners to take charge of and settle up the affairs of said company; that William H. Washington was once a director of the company, and that his brother, F. H. Petrie, has a mortgage on about sixty of said slaves to secure $29,000, which respondent owes him. He denies all fraud, and denies that the complainants have any good cause to believe that any of said slaves will be removed out of this state. He then answers each of the thirty-one special interrogatories contained in the bill, but as all of the answers are substantially set out in his answer in chief, it is not deemed necessary to repeat them.

The answer of F. H. Petrie denies all fraud, and refers to and adopts the answer of William Petrie. He further states, that in December, 1839, William Petrie was indebted to him in the sum of $29,176 81½, for money before that time loaned to him, and to secure the payment of that sum of money, William Petrie, on the 20th day of December, 1839, executed a mortgage on sixty-eight slaves, which mortgage was duly recorded, and was exhibited with his answer. He avers that at the time he received the mortgage, he was entirely ignorant that the Mississippi and Alabama Railroad Company, or any one for them claimed, or pretended to have any right, title, claim or interest of any kind whatever, in, to, or upon said slaves, either in law or equity; respondent believed them then to be, and he now believes them to be the property of William Petrie. These slaves are a part of the number levied on by complainants; and respondent claims the protection of the court, to secure him the benefit of his mortgage aforesaid, under any circumstances, inasmuch as he is an innocent purchaser, ignorant of any frauds, trusts, combinations, or contrivances, if any such existed, which respondent does not believe, between William Petrie and the said company or its directors, or any of them. Claiming the benefit of his mortgage, and in nowise or under any circumstances waiving the same, he proceeds to answer the special interrogatories, &c.

Robert G. Crozier answered, and denied all fraud. He states

Digitized by Google

that he was a stockholder and director in the Mississippi and Alabama Railroad Company, in the years 1837, 1838 and 1839; that there was a full and final settlement between Petrie and the Company, in December, 1839, which he is satisfied was made fairly and in good faith; denies that the directors of said company, so far as his knowledge extends, ever used the company to amass large fortunes for themselves, or committed any of the frauds charged in the bill. Some of the directors are in possession of large amounts of property, but he believes they all owe more than their property is worth. The said company, to his knowledge, never bought or owned a negro. Petrie bought a great many negroes to work on the railroad from Jackson to Brandon, and he believes some of them are the same levied on by the complainants. He has no doubt Petrie's claim to them is founded in justice and equity. And he substantially sustains the answer of William Petrie throughout.

Henry K. Moss also answered; denied all fraud, and sustained the answer of William Petrie.

Neither of the other defendants answered, and the bill was taken for confessed as against them.

On the 28th day of February, 1842, the complainants filed an amended bill, stating the death of William Petrie, and that he had made a will, by which he appointed Lemuel W. Petrie and Frederick H. Petrie his executors, and conferred on them full power and authority to sell and dispose of all or any portion of his property, either real or personal, they pleased; that the executors had qualified and given bond in the small sum of $5000 only, an amount entirely inadequate to secure the negroes and other property which they alleged ought to be sold for the payment of their judgments; that the answers of William Petrie and Frederick H. Petrie to the original bill contained abundant evidence of fraud to justify the decree asked for by the complainants. Charges that the company was utterly insolvent, had been divested of all its officers and dissolved, and that there was no one to take of effects except the creditors. And concluded with a prayer for the appointment of a receiver and for process to take the property out of the posses-

Digitized by Google

sion of the executors, unless they gave another bond in sufficient penalty, and with sufficient security for the safe keeping and delivery of the negroes, &c.

Process was issued, and the executors gave the further bond prayed for in the amended bill, and retained the possession of the negroes, &c.

The answer of the executors to the amended bill admits the death of William Petrie; that he made a will and appointed them executors, and they qualified and gave bond as charged by complainants. They say they gave the bond in the penalty fixed by the probate court, and whether it be too large or small they deny the right of the complainants to object to it, as they are neither heirs, legatees or creditors of William Petrie. The answer denies all the material allegations of the amended bill.

The depositions of Samuel M. Puckett, John W. King, Wright Ford, Charles Lynch, and George Adams, were taken and read on the part of the complainants.

Samuel M. Puckett proved that he was twice elected a director of the Mississippi and Alabama Railroad Company, and served in that capacity until Governor Lynch was elected in 1839; that he was not a director, and consequently not present at the time of the settlement with William Petrie, in December, 1839, and the information he possessed on that subject was derived from Col. William H. Shelton, who informed him that about the time it was necessary for Petrie to go to New Orleans to try to secure the iron for the completion of the railroad, Petrie was afraid to go lest he might be garnisheed by some creditor of the company, on account of his indebtedness to or contract with the company, and that therefore the company had a settlement with him and gave him a receipt in full, and his liabilities on account of the non-completion of the road were transferred to his brother, F. H. Petrie; that Governor Lynch, as president of the company, asked William Petrie how much Brandon money he would take and complete the road, and he replied, one hundred thousand dollars. Governor Lynch counted out that sum, and then handed him twenty-five thousand dollars more to insure the completion of the road; all of which

Digitized by Google

was received by William Petrie, and all the liability for the completion of the road was transferred from William to F. H. Petrie. Col. Shelton said Petrie never returned the money to the company. The company, in 1839, was embarrassed, and has not improved since. The legislature passed a law to appoint commissioners to settle the affairs of the company; commissioners were appointed, and the company have had neither president nor directors since.

John W. King proved that he was a director of the Mississippi and Alabama Railroad Company during the years 1837 and 1838; that the company undertook to construct a railroad from Jackson to Brandon, and entered into a written contract with William Petrie to build it. The work was only partially done, no part of the road being finished. That of his own knowledge he knew nothing of the settlement between William Petrie and the Company, made in the latter part of 1839. But he states that he was an acting director of the Jackson and Brandon Railroad and Bridge Company, and a meeting of the directors of that company was held some time in the spring of 1841, for the purpose of ascertaining whether William Petrie intended to carry out his contract for the completion of said road, or not. Several members of the board of directors of the Mississippi and Alabama Railroad Company, and William Petrie were invited to attend said meeting. Col. William H. Shelton and other directors, and Petrie attended as requested. At the meeting Petrie claimed to be entirely released from any further performance of his contract, and he produced a paper purporting to be a settlement or receipt from the Mississippi and Alabama Railroad Company, by which it appeared that, in consideration of an advance of $15,000, his brother, F. H. Petrie, was to finish the road and deliver it complete to the company, or he was to finish it at his own expense, and retain the possession of it until out of the first profits of the road he had received that sum, witness could not state which. William Petrie then stated that he, or his brother had failed to complete the road, because the company had failed to procure the right of way, and he had been forbidden by the owners of the land on the route, or some of them, to proceed with the work, and because the iron for the

Digitized by Google

road had not been received as was expected. Col. Shelton's statement did entirely concur with William Petrie's. He, Shelton, said the settlement was made for the protection of Petrie on a contemplated visit to New Orleans in relation to the business of the railroad, and to secure him from molestation while there. That in consequence of the delays and disappointments Petrie had met with from the difficulties in procuring the right of way, and losses suffered on the money he had received, although he had received as much or more than the amount originally agreed upon for the completion of the road, yet in consideration of these facts the company, anxious to secure the speedy completion of the road, agreed to give him a further advance of $15,000, and furnished him with Brandon money, considered equal to that amount of par funds; and receipts were passed as upon a final settlement. Still it was understood that Petrie was to go on and finish the road and furnish everything. Petrie admitted he had received the Brandon money, and considered it his own, and he still had the most of it, as he had not been able to use it on account of its continued and rapid depreciation. At the time the road was worked on, the land along the route was owned by Richards & Washington, William Petrie, Payne & McKay, R. Downing, James Gourley, Richard Cordell, William H. Martin, Thomas Kinku, William Bailey, T. J. Coffee, H. K. Moss, Dow Kinker, Miller M. Gardiner, and William D. Hathorn. Witness and William C. Harper, in 1841, undertook to ascertain how far the right of way had been relinquished by the said owners, and they could find no relinquishment from any of them except James Gourley and O. C. Dow for part of the forty-acre lot now owned by H. K. Moss, and a part of the tract now owned by M. M. Gardiner was relinquished by Alexander Mathewson. Witness further testified, that the condition of the Mississippi and Alabama Railroad Company in 1839 was not good, and has since then grown rapidly worse, and is now defunct. The company has ceased to do business since the passage of a law repealing its charter, and since then has had neither president nor directors.

Wright Ford proved that he was present at the meeting of

Digitized by Google

the directors of the Jackson and Brandon Railroad and Bridge Company, in 1841, spoken of by Mr. John W. King, and he fully corroborates the testimony of Mr. King, as to what occurred at that meeting. He further proved, that the Mississippi and Alabama Railroad Company were in a failing condition in 1839, and has been growing worse ever since; their charter was repealed in the winter of 1840, and since that time they have neither had a president nor directory, and the company are now wholly insolvent.

Charles Lynch testified, that in 1839, a final settlement relative to the bridge and railroad, took place between Petrie and the company. That he was present at the meeting when the settlement was made, and acted as the presiding officer of the board of directors; that he was appointed a director only a short time prior to the settlement; and not having had anything to do with making the contract with Petrie, and not knowing what had previously taken place between Petrie and the company, deponent took no active part in the settlement, but left it mainly with the other members of the board, to whom the whole transactions were familiar. He does not recollect whether the settlement was reduced to writing or not; that the books of the company are not in his possession, nor does he know in whose possession they are, and he cannot, therefore, state any items of the account. He could not pretend to say whether the company, at the time of the settlement, were solvent or insolvent; yet he could state that it was represented at the time by the officers who kept the books and accounts of the company, that the debts due them far exceeded their liabilities. Deponent could not say positively, but, according to the best of his recollection, the notes of the company were worth in the market, at the time of the settlement, about twenty, or twenty-five cents on the dollar. No bridge over Pearl river has been completed, though a great deal of work has been done on it.

Being cross-examined, he said there was no fraud or collusion between Petrie and the directors of the company, in making the settlement, and, so far as he knew, it was fair and *bona fide*.

Digitized by Google

At the time of the settlement he heard Petrie complain of the company, and state that he had suffered by their failure to comply with their part of the contract. During the investigation of the accounts there was some excitement and warmth manifested; and after the settlement was completed he heard Petrie complain that the company had not allowed him as much as he was entitled to. He has no distinct recollection of the cause assigned then, by Petrie, for not proceeding and completing the work; but he is under the impression that the cause then assigned, was, that the company could not, or would not, furnish him with the means necessary for that purpose; and after that time he heard Petrie say he was stopped by the owners of the land through which the road passed, and prevented from proceeding with the work. There was a great deal of work done on the bridge and railroad, by Petrie, but he had not sufficient knowledge of those things, to say in what the chief cost and labor on the work done consists. He could not say whether there were any judgments against the company at the time, or not.

George Adams testified, that, in 1839, he was present when the president and directors of the Mississippi and Alabama Railroad Company and William Petrie had a meeting, to settle their accounts for building a railroad from Jackson to Brandon. The directors and Petrie were seated around a table, with their accounts spread out before them, and he was seated at some small distance from them. He had been previously called on by the company, and gave them legal advice; but on that occasion they did not ask, nor did he give any advice. He examined none of the accounts, nor can he give any of the items of either of them; nor can he say what took place during the settlement. But after it was over he heard Petrie, or some of the directors, or both, say that it resulted in a balance in favor of Petrie; the amount of the balance he does not recollect. Deponent cannot undertake to say whether, at the time of the settlement, the company were solvent, or insolvent; but it was the opinion of the directors, or some of them, often expressed to deponent, about that time, that if the company could collect

Digitized by Google

what was due them they would have sufficient means to pay their debts, and have at least a million and a half dollars over. The notes of the company, he thought, were worth when the settlement was made, about twenty-five or thirty cents on the dollar. The bridge over Pearl river was not then completed; but Petrie had done a great deal of work on it. He could not say whether there were any judgments against the company at that time, or not.

On cross-examination, he said he knew of no fraud or collusion between Petrie and the company, in making the settlement; and, so far as he knew, it was fair and *bona fide*. He heard Petrie complain of the company, and say he had suffered by them; but in what way, or to what extent, deponent could not say. After the settlement he heard Petrie say the company had not allowed him as much as he was entitled to. He understood to assign as a cause why he could not proceed with and complete the bridge and railroad, that the company would not, or could not, furnish him funds necessary; if he assigned any other reason, or cause at the time of the settlement, deponent does not recollect it.

On behalf of the defendants the depositions of Robert G. Crozier, William H. Shelton, Thomas J. Coffee, William G. Bullock, Henry K. Moss, John T. Blow, Hamilton Washington, Frederick H. Petrie, and Thomas P. Falconer, were taken and read in evidence.

Robert G. Crozier proved that he was appointed a director of the Mississippi and Alabama Railroad Company in 1837, and he continued to act as such for several years; that the company made an agreement with William Petrie, a true copy of which is exhibited with the bill, to build a railroad from Jackson to Brandon; that Petrie purchased slaves, and placed them on the road according to the agreement, but never executed any mortgage on them to the company, to his knowledge; that the company never owned, or claimed any slaves or other property purchased by Petrie, except the right to a mortgage on the slaves for the performance of the contract; that Petrie worked on the road until he was stopped by the owners of the land

Digitized by Google

through which it passed. There was a final settlement between the company and Petrie, made in good faith and without any fraud, as he believes, when William Petrie was discharged, and it was understood that F. H. Petrie should complete the road, and retain the use of it until it paid him a balance of 15,000 dollars. William Petrie was paid in the notes of the company, and made great sacrifices in getting par funds for them, and the company agreed to make up the loss to him. Petrie frequently complained of the want of faithfulness of the company, in keeping their part of the contract. At the time of the settlement the company were indebted to Petrie, according to his account, though the balance claimed was compromised. When Petrie entered into the contract with the company he was, as deponent believes, in very good pecuniary circumstances, and stood well as an efficient engineer, and worthy man. On being cross-examined, he said he believed the contract made by the company with Petrie was made in good faith, and intended to be carried out; he thought Petrie quit work on the road in 1839; deponent could not state the value of the road when Petrie quit; no part of it was finished; he believed Petrie abandoned it in consequence of the failure of the company to procure the right of way; he could not say how many of the owners of the land through which the road passed were engaged in stopping Petrie from working on it, but he knows Hamilton Washington, who was one of the owners of the land on Pearl river where the railroad bridge was to be built, refused to suffer Petrie to work on it any longer, unless Petrie would pay him $6000. The company abandoned the road, temporarily, because they had not funds to carry it on; and because they were not able to get the right of way from the owners of the land. Deponent could not tell how much money was paid Petrie, nor why the company agreed to pay $15,000 for the completion of the road. He was not present at the final settlement, and could not say what pledges were made by William Petrie, for the completion of the road. Petrie was paid in the notes of the company, and had to make sacrifices in getting good funds for them; and deponent has frequently heard the

Digitized by Google

company say they would lose the discount. He knows of his own knowledge, that the company several times failed to furnish Petrie with par funds, and entirely failed to get the right of way. He knew Petrie well, and his services as an engineer, five or six years ago, would have commanded six or seven thousand dollars a year. Deponent said he did not think the entire superstructure of the road was finished, though it was nearly all done; there are no turnouts, turning platforms, side roads, water stations, nor warehouse made; he understood a locomotive and tender, and some cars, had been built for Petrie, but he could not say whether they had ever been received or not. He further testified that some railroad iron had been purchased, but he did not know who paid for it, though it was attached in New Orleans by the creditors of the company, and he thought it had been sold.

William H. Shelton testified that he was appointed a director of the Mississippi and Alabama Railroad Company, at the commencement of its operations, and continued as such as long as the company did any business as a bank; that he has examined the agreement filed as an exhibit to the bill, and believes it to be a true copy of the agreement entered into by Petrie and the company; that Petrie was employed as an independent contractor, to build the road. The company never had any right or interest in the slaves and other property bought by Petrie to carry on the work, except by virtue of a mortgage, or mortgages, executed by Petrie to the company, on a portion of the slaves, to secure the faithful performance of his part of the contract. Petrie executed one or more mortgages to the company, in conformity with their agreement, which were recorded on the books of the company, and subsequently delivered up to Petrie. William Petrie worked on the road until he suspended for the want of funds, which the company had promised to furnish him; but failed to do so from inability. F. H. Petrie afterwards undertook to carry out the contract of William Petrie, and worked until he was stopped by the owners of the land through which the road passed. He further testified, that during the presidency of Charles Lynch, the precise date

Digitized by Google

he could not recollect, there was a final settlement between Petrie and the company. During the settlement it appeared that the account against William Petrie had been improperly kept, by order of the cashier, under the head of "Railroad Expenditures," and he was charged with various amounts, not properly chargeable to him. Upon a review of the whole matter, taking into consideration the losses sustained by Petrie by being delayed in the work for want of funds, loss on uncurrent money, injury sustained by freshets, decay of timber, &c., it was agreed by the company, that if William Petrie would complete the work, according to his contract, the company would release all claims against him, and pay him out of the receipts of the road, after it was complete, the sum of $15,000. William Petrie's health not being good at that time, his brother, F. H. Petrie, proposed to fulfil his contract, and the company agreed he should do so, upon William Petrie's pledging himself for his, F. H. Petrie's faithful performance. F. H. Petrie commenced his labors soon afterwards, and continued to work until he was stopped, as above stated. Deponent never heard of William Petrie's having purchased any property for the company, and does not believe he ever did; there never was any agreement made, or any understanding existing, that the property purchased by Petrie should be held in trust for the company; nor was there any fraud intended or committed in the settlement of the account; it was a fair and open settlement, made by a majority of the board of directors, and although objections were made to some charges in the accounts, on both sides, yet, in conclusion, all expressed satisfaction with the result, and claimed nothing from Petrie, except the completion of the road. And when that was done he was entitled, as before stated, out of the first receipts, to the sum of $15,000. Deponent's acquaintance with William Petrie commenced with Petrie's engagement as engineer for the Jackson and Brandon Railroad and Bridge Company, and his recommendations and references then placed him on elevated ground, as a gentleman and an efficient engineer; and he was represented as having some capital, and his credit was very good. The negroes pur-

Digitized by Google

chased by Petrie were paid for in the notes of the company, upon Petrie's drafts; and he complained of having to pay higher prices for the negroes, on account of the character of the funds in which the payments were made. Much the largest portion of the advances made to Petrie for other purposes than the purchase of negroes, was in the same kind of funds, and he often complained of the trouble and loss he sustained on that account. And deponent has always thought that those losses should be made good by the company, but he does not know of any specific understanding that Petrie was to dispose of the money, and only account for the net proceeds, except in one instance; in that instance he drew a hundred, or a hundred and twenty-five thousand dollars, in the notes of the company, and took them to New Orleans, for the purpose of getting the railroad iron; and he was instructed to use the money to the best advantage, and account for the net proceeds. In the final settlement, however, the losses sustained by William Petrie upon other advances, were taken into the account. Petrie always manifested a desire to finish the road, and complained of the company's failing to comply with their part of the contract.

On being cross-examined he testified, that he did not know of any other contract being made between Petrie and the Mississippi and Alabama Railroad Company than the one filed as an exhibit to the complainant's bill, unless the settlement be considered one on taking F. H. Petrie as a substitute for William Petrie. There was a written contract between Petrie and the Jackson and Brandon Railroad and Bridge Company which he thought was done away with by the contract with the Mississippi and Alabama Railroad Company; that he does not recollect how many mortgages were given by Petrie to the company, though he was under the impression there were two or three, and they were handed to the cashier for record in a book kept by the company for that purpose, and one or two were so recorded, but the record of them in probate clerk's office was neglected; they were ultimately given up to Petrie by the order of the board of directors. He does not recollect, and not having the books before him he cannot now give the number of

Digitized by Google

negroes mortgaged. For a history of the proceedings of the board of directors held on the 7th day of March, 1840, he refers to the exhibit filed with the deposition of John T. Blow. The contract made with Petrie was made with a *bona fide* intention on the part of the company of prosecuting the work to completion. From the ledger of the company it appears that William Petrie has, upon his checks and drafts, drawn the sum of $294,794 91, and a charge is made against him of $17,266 95, for railroad iron, which was taken from him in New Orleans, and which, if he is properly chargeable with it under the contract, will swell the sum to $312,061 86. On the 18th day of November, 1839, he is charged with the further sum of $125,000, which is the same that was furnished him when he was about to start to New Orleans for the railroad iron, and which he was authorized to dispose of on the best terms he could. On the final settlement, Petrie stated that not having been able to get the iron he had not disposed of the $125,000, and he accounted to the company for it at 18 cents on the dollar. Deponent could not say how many slaves were purchased by Petrie, nor what those purchased cost. In 1838, Petrie addressed a letter to deponent, as president of the company, stating something like the amount that had been expended on the road up to that time; deponent had not a copy of that letter before him and he could not give the particular items of expenditure; the only one he remembered was, $159,000 for slaves, though there was probably other property included in that item. The principal part, and perhaps all of the money expended came from the company. It appears from the ledger, above referred to, that up to the 27th day of July, 1838, Petrie had drawn upon checks and drafts $234,030 83. The company have never either abandoned the road, nor released William Petrie from its completion, further than to agree that F. H. Petrie might fulfil the contract, upon William Petrie's guaranteeing that he should do it in good faith. After that agreement, F. H. Petrie commenced work on the road and bridge at Jackson, and continued until he was stopped by Washington, and other owners of the land through which the road passed.

Digitized by Google

He could not say precisely when F. H. Petrie commenced or quit work, nor the value of the road when he quit. No work has been done on it since, and in its present unfinished state he did not consider it of any value. The railroad iron was bought at the request of William Petrie, and Messrs Humphreys and Biddle charged the company for it $17,266 95, and the company paid it. The iron was shipped to New Orleans in the name of "William Petrie, contractor, &c.," and was attached in New Orleans as the property of the company and has never been received. Deponent does not believe that according to the original contract the company were indebted to William Petrie at the time he stopped work for want of funds; but in the early part of the year 1838, Petrie asked an extension of time for the completion of the road, and for reasons then assigned and deemed satisfactory by the board, he required an advance of forty or forty-four thousand dollars in par funds, to be paid in instalments all falling due in the year 1838, the board thought they could meet the payments, and therefore promised the advance, but in consequence of the pressure of the company in 1838, they did not furnish more than $10,000, and that was paid in a certificate of deposite of the Bank of the United States, and is improperly charged on the books at 15,000. Deponent supposed, until he examined the books, that the agreement to give the extension of time and make the advance spoken of, had been recorded, but he has not been able to find any record of it, and he therefore only speaks of it from memory. He knew that Petrie presented his petition in writing, which was marked at the board, "agreed to," and handed to the cashier. The present impression of deponent is, that this advance was asked and granted over and above what Petrie could have claimed, under his contract as due him. Before Petrie went to New Orleans a partial and not valid settlement was made, and several documents given him in special trust to guard and protect him from the New Orleans *calaboose*; but the final settlement, so far as deponent knows or believes, was *bona fide* and made in good faith, and in the firm confidence on the part of the company that the railroad and bridge would be completed by

Digitized by Google

F. H. Petrie, according to the then understanding with as little delay as possible. For a copy of the resolutions passed on the 10th day of September, 1839, he refers to the deposition of John T. Blow. Those resolutions were passed according to the best of his recollection, in consequence of the representations of William Petrie that without something of the kind to take with him, he might be garnisheed in New Orleans as a debtor to the company, and a copy of the resolutions was handed to him when he left for New Orleans for the purpose of attending to the release of the railroad iron. There was no written obligation taken from F. H. Petrie, or William Petrie as his surety. Deponent knows nothing of the value of William Petrie's services as an engineer, further than that he received, as engineer of the Jackson and Brandon Railroad and Bridge Company, a salary of $7,500 per year.

William G. Bullock testified, that he always understood the slaves and other property purchased by Petrie were his property, and the company never had or claimed any ownership of them so far as deponent knew or ever heard; Petrie never acted as the agent of the company, but as an independent contractor. Petrie was paid principally in the notes or issues of the company, on which he made repeated sacrifices to get par funds, and once, by agreement with the company, when the notes were greatly depreciated, sold them for their market value. Petrie was anxious to complete the road, and often complained that the delay of the company to furnish him the means to progress with the work was subjecting him to heavy losses. Deponent knew nothing of Petrie's pecuniary circumstances, but his character as an honest man was unimpeachable; he was a trustworthy gentleman, and a capable engineer. On being cross-examined, he said he was connected with the company as book-keeper and teller, and kept part of the account in which Petrie's checks and drafts were charged, under the head of "railroad expenditures." He copies from the books, and files with his deposition the account against Petrie, from which it appears that Petrie is charged with $451,556 11. The $125,000 furnished Petrie when he visited New Orleans to release the rail-

Digitized by Google

road iron, and $17,266 95 for the purchase of the iron, are charged in the account. On being re-examined by the defendants, he stated that there were between forty and fifty thousand dollars improperly charged in the account to Petrie.

Thomas J. Coffee testified, that he was appointed a director of the Mississippi and Alabama Railroad Company in December, 1836, and continued to act as such until the charter was repealed by the legislature; that he has examined the agreement exhibited with the bill, and is satisfied it is a true copy of the contract between Petrie and the company for building a railroad. The company never had any right or interest in any slaves or other property purchased by Petrie, except by virtue of a mortgage or mortgages executed by him to the company upon a portion of the slaves. Petrie executed one or more mortgages to the company which were recorded on the books of the company, and subsequently cancelled and given up to him; that he worked upon the road until he was prohibited by the proprietors of the land through which the road passed; that there was a final settlement between Petrie and the company, at which time the company acknowledged themselves indebted to Petrie in the sum of $15000 whenever the road should be completed; and he was, when completed, to retain possession of it until the profits should pay him that amount, and then deliver it up to the company in good order. After the settlement the company had no claim or interest of any kind in the slaves and other property bought by Petrie. He does not believe there was any fraud intended or committed in the settlement. It was agreed that F. H. Petrie should finish the road in lieu of William Petrie, and retain it until it paid him $15000. When Petrie made the contract with the company he owned fifteen or twenty slaves, was unembarrassed, and sustained a high character as an efficient engineer and a trustworthy man. Petrie was paid principally in the notes of the company, upon a portion of which he frequently represented to the directors he was compelled to submit to serious loss, and in the final settlement those sacrifices were taken into consideration, but anterior to that time deponent has no knowledge that Petrie was author-

Digitized by Google

ized by the company to make such sacrifices, except in one instance, when he drew about $100,000, to redeem the railroad iron attached in New Orleans. Petrie manifested a desire to finish the work, and often complained of the company's failing to comply with its part of the contract. Deponent does not know of any other contract between Petrie and the company except that exhibited with the bill. He knows that Petrie refused to act in any other capacity than that of contractor. On cross-examination he testified, that there were two or three mortgages executed by Petrie to the company, but he did not think they were ever recorded in the probate office, and presumed it was through the negligence of the officers of the company. He could not say how many negroes were mortgaged, nor where the mortgages now are unless they are in the possession of Petrie. By reference to the books of the company he said it appeared that the directors met on the 7th day of March, 1840, and he referred to the deposition of John T. Blow for a history of the proceedings of that meeting. Petrie purchased about 140 or 150 negroes, but deponent does not know whether they are the same involved in this controversy. Nearly all of the superstructure of the road has been finished, though no turnouts, turning platforms, side roads, water stations, or warehouses have been built, and no locomotive, tender, or cars have been furnished. The iron was ordered from Liverpool to build the road, but he does not know how much was paid for it. William Petrie gave up the road to his brother, when the company had a final settlement with him, and the company have abandoned the road ever since the legislature repealed their charter. The contract with F. H. Petrie was only verbal; the road has never been finished nor delivered to the company. Hamilton and Fairfax Washington at Jackson, threatened to prevent by force the prosecution of the work on their land. The superstructure was everywhere else completed except at the depot at Brandon, where M. Gardiner, another proprietor of the land, objected to the continuance of the work. He further stated that he visited William Petrie at his residence shortly after he commenced building the road, and he then told depo-

Digitized by Google

nent he owned several valuable negroes, and was worth about or upwards of $20,000, and was unembarrassed. Deponent cannot say what his estate is now worth.

Frederick H. Petrie testified, that William Petrie undertook to build the road in the character of an independent contractor, and not as the agent of the company; that he purchased the negroes, horses, oxen, &c. in his own name, and for his own use, and always considered them his own property, subject only to the mortgages in favor of the company as security for the performance by William Petrie of his contract with them. The mortgages were executed and are filed as exhibits to William Petrie's answer. Petrie worked on the road two years and nine or ten months, and then ceased for want of the right to proceed. About seven-eighths of the whole road were finished when Petrie ceased to work on it. In December, 1839, a final settlement was made between the company and Petrie, at which time the company were found to be indebted to Petrie in the sum of $15,000 for the completion of the road. William Petrie was discharged from the further prosecution of the work, and it was agreed that deponent should finish the road for the $15,000, and if the company were not prepared to pay it, he would retain the possession of the road until he was paid out of the tolls. At the time the contract between William Petrie and the company was made, Petrie's pecuniary condition was very good, his character beyond reproach, and his reputation as a civil engineer equal to that of most men. Since the settlement the company have never asserted any claim whatever to the negroes and other property purchased by Petrie, but have regarded it as Petrie's, freed from the mortgages. Deponent does not know in what kind of funds the company paid Petrie, but believes they paid him in their own notes, which were below par at the time, and that at one time Petrie was authorized to dispose of them at their market value. He knows that Petrie was anxious to finish the road, and frequently complained that he was delayed to his serious injury on account of the failure of the company to comply with their contract; and on the final settlement he relinquished the balance he claimed to be due,

Digitized by Google

solely for the sake of a compromise. On cross examination, deponent testified, that Petrie encountered lime stone rock in excavating the ridge near Brandon. He cannot say precisely, but thinks the wooden rails are laid on the whole road except about seven-eighths of a mile nearest to Brandon; that deponent worked on the road about three months, and employed from sixty to eighty hands, all belonging to William Petrie, and he thinks their labor was worth from nineteen hundred to twenty-five hundred dollars. He states that he is interested in this case only to the extent of his lien on the slaves for the payment of $29,000, and he does not depend on the result of this suit for the liquidation of that claim.

John T. Blow testified, that he was elected a director of the Mississippi and Alabama Railroad Company in 1839, and served until some time in 1840; that the company never had any claim or interest in the negroes and other property purchased by Petrie save what they acquired by the mortgage executed to them on some of the negroes in pursuance of his contract. Petrie worked on the road two years and upwards, the whole route was graded, and the superstructure laid down except within a mile of Brandon, and about half that distance at the termination of the road at Jackson, when Petrie was driven away by the landholders. On the 21st day of December, 1839, there was a final settlement between Petrie and the company, when Petrie was released from the further prosecution of his contract, his mortgages cancelled and given up, and everything settled to the entire satisfaction of the parties; at the same time a contract was made with his brother, F. H. Petrie, to complete the road, for which the company were to give him $15,000. At the time of the settlement, William Petrie was not indebted to the company, nor did they claim any ownership over the slaves and other property. Petrie was paid chiefly in the notes of the company, and he must have made considerable sacrifices in using them, as they were greatly depreciated when most of them were paid him. So far as the knowledge of deponent extends, and he has had every means of knowing, having served in the institution from its commencement as

Digitized by Google

clerk, and recorded the contract between Petrie and the company, he believes the contract was made and fulfilled in good faith on the part of Petrie. Being cross examined, he said he knew of but one mortgage given by Petrie to the company, that one deponent recorded on the books of the company, but he does not believe it was ever recorded in the office of the probate clerk. There was a meeting of the directors held on the 7th day of March, 1840, and the following is a true copy from the books of the proceedings of that meeting, to wit:

"*Jackson*, March 7th, 1840.

"The board met agreeably to adjournment; present, Charles Lynch, President, William H. Shelton, Thomas J. Coffee, Thomas P. Falconer, H. K. Moss, and John T. Blow; John T. Blow acting as secretary.

"*Resolved*, that the president and directors of the Mississippi and Alabama Railroad Company have had under their consideration the last act of the legislature, to repeal the act incorporating said company, and have come to the conclusion, without denying or admitting its constitutionality, to submit to and confirm so much of the repealing act, as contemplates the repeal of the banking powers and privileges of said company; but protest against the constitutionality of such repealing act, in relation to the powers and privileges and property required in the railroad, by and under the act authorizing and incorporating said company; and they consider themselves authorized to go on as a railroad company and complete said railroad, on which they have already expended upwards of $300,000; that by a resolution of the board passed and recorded long prior to the passage of said repealing act of the legislature, to wit, on the 21st December, 1839, a transfer was made of all bills receivable, held by said company, for the purpose of paying the debts and claims against said company; and the president and directors will proceed in the name and right of the said railroad company to manage its affairs for the purpose of paying its debts and completing said road, if practicable, and will rely for their justification and the protection of the property and rights of the

Digitized by Google

stockholders, in said company, upon the 10th section of the 1st article of the constitution of the United States, and the 19th section of the 1st article of the constitution of this state, and they might justly claim the protection offered, even by the late legislature of Mississippi in an act passed subsequent to the act repealing the charter of this company, which expressly exempts and saves from repeal the charters of the several banks of this state which have completed in whole or in part any railroad or work of internal improvement, and that such bank shall only forfeit and surrender their banking privileges, which privileges this board has long since ceased to exercise; and they will not exercise any banking power or privilege hereafter; but the powers, rights, and privileges of the corporation as a railroad company, they will endeavor to maintain under the national and state constitutions and the charter of said company, which they feel themselves bound to do for the interest of the stockholders and the benefit of the public." The amount of expenditures named in said proceedings, so far as the same are in compliance with the contract of Petrie, deponent believes to be correct. The contract with Petrie deponent believes was made in good faith. He knows of no money placed by the company to the credit of Petrie in Philadelphia or elsewhere; Petrie commenced work on the road in 1837, and his brother quit in the spring of 1840. The superstructure of the road was nearly finished; there were no turnouts, platforms, side roads, water stations, nor warehouse built, and no cars, locomotive nor tender procured; nor has the bridge over Pearl river been finished. The road, he believes, has been abandoned by the company but he cannot say when they came to the conclusion to abandon it; William Petrie has not worked on the road since he was discharged on the 21st day of December, 1839, though his brother has worked on it since then under the contract made with him; and since he quit work nearly all of the timbers have decayed; Petrie was stopped from working by H. Washington at one end of the road, and M. Gardiner at the other. The railroad iron was purchased in Liverpool by Messrs. Humphreys & Biddle, by order of the company, and

Digitized by Google

charged to the company; it was attached in New Orleans by the creditors of the company, and has since been sold under the attachment, as deponent has understood. The accounts between Petrie and the company were settled in the usual way, each party producing their account in writing. When the final settlement was made, Charles Lynch, T. P. Falconer, William H. Shelton, T. J. Coffee, R. M. Hobson, H. K. Moss, John T. Blow, and R. G. Crozier were the directors present. According to Petrie's account the company were then indebted to him about $30,000; but being in bad health and anxious to close his business with the company, he agreed, for the sake of compromising, and closing his accounts, to relinquish the balance claimed, upon their discharging him from his contract and permitting his brother to complete the road and retain possession of it until the profits paid him $15,000. On the 10th day of September, 1840, there was a meeting of the directors, and the following is a true copy of the proceedings of that meeting, to wit:

"Whereas, under a contract entered into by this company with William Petrie, being dated on the , 183 , this company undertook among other things to furnish money to the said Petrie to purchase negroes, iron, cars, &c. to enable him to construct the railroad from Jackson to this place; and whereas, the said Petrie on his part, obligated himself to construct the said railroad for a certain amount of money therein named, to applied to the payment of the advances made to him under said contract, and furthermore mortgaged to this bank all the negroes purchased to work on said road for the purpose of securing to the company the faithful construction of the railroad and for the payment of such balance as may appear against said Petrie, after the railroad is fully completed and delivered to this company; and whereas, questions have arisen whether said Petrie can now or at any time before the completion of the railroad be considered as a debtor to this company, and if so, in what kind of funds the same is to be paid; *Resolved*, therefore, that this company do not consider Petrie indebted to the

Digitized by Google

company at this or any future time until the railroad is completed, and when that event takes place this company never have and never will claim in payment any other funds than their own issues for the said balance, if any may appear against him upon a final settlement, after the railroad is completed and received by this company, or the job abandoned by the contractor." The pledge made by William Petrie, that his brother, F. H. Petrie, should complete the road, was a verbal one; it was to have been drawn up in writing, but the directors never held a regular meeting after that time, and it was never done. F. H. Petrie proceeded to work on the road under the verbal contract, and continued until he was prevented by Washington from going any further. In the final settlement made on the 21st day of December, 1839, the cost of a locomotion was charged to Petrie; the resolutions passed by the board on that day are as follows, to wit: (These resolutions are the same exhibited with William Petrie's answer, and are not therefore inserted here.) Being re-examined by the defendants, he knew of some items improperly charged to William Petrie, that appeared in the account under the head of "railroad expenditures." There was one item of $8,000, which was paid to F. H. Petrie for surveying the route from Paulding to Mississippi and the harbor at that place; another item was for expenditures on the Jackson and Brandon Railroad and Bridge Company; and there were still other items not properly chargeable to William Petrie, under his contract. The book-keeper, to save the trouble of opening a separate account against William Petrie, kept the whole account of expenditures under one head.

Thomas P. Falconer testified, that he was appointed a director of the Mississippi and Alabama Railroad Company at its commencement, and continued a director as long as they continued to do business; but living a hundred miles or more from Brandon, he seldom attended the meetings of the board, and his knowledge of their actings and doings was consequently very limited. He has examined the copy of the agreement made by the company and Petrie, exhibited with the original bill, and he believes it to be correct. Petrie did work on the road in pursu-

Digitized by Google

ance of his contract, but how long he worked, how much he did, and why he ceased, deponent could not say. The negroes and other property purchased by Petrie were purchased in his own name, for his own use, and as his absolute property; the company never had or claimed any interest in them, so far as deponent knows or believes. Deponent believes Petrie acted in good faith as the contractor of the company. There was a final settlement of the accounts between Petrie and the company, and deponent believes there was at that time a balance in favor of Petrie, but how much he does not know. On cross-examination, he stated that he had answered the direct interrogatories from his own knowledge and recollection of the facts acquired in his capacity as a director. He does not know how much money the compaay expended on the road. The contract required Petrie to build the road, and if released from it, deponent does nót know when, nor how it was done; he cannot say whether the final settlement was reduced to writing or not, he never saw it, and if it was reduced to writing, he does not know who has it now.

Hamilton Washington testified, that he claimed the land over which the road ran for about three-quarters of a mile, or a mile, and had never granted the right of way to the company; that when he purchased the land in the fall of 1839, Petrie was proceeding to construct the railroad, without the company having acquired the right of way from the previous owners, and without their taking any steps to acquire it from deponent; he, Petrie, had committed a good deal of waste, and was committing more when deponent required that the work should cease, or the right of way be acquired in a legal manner. Neither was done, and he went upon the land to stop the trespass by force; the workmen left the road, however, upon being required to do so, and thus rendered force unnecessary. About that time, he cannot say whether it was before or after the hands were sent off, he was informed that the work would go on, and the workmen be protected by an armed force; he made preparations to resist such force, and sent a friend to Mr. Petrie, requiring that if such intentions were entertained he should name the time

Digitized by Google

when the attempt would be made, that deponent might be on the ground to meet it. Mr. Petrie was made to understand fully that he could not go on with the work unless the right of way was legally acquired, or he could take on the ground a larger armed force than deponent was able to resist. Deponent notified Petrie that he was a trespasser and liable for all the damages he had committed, though no legal steps had been taken by deponent to render him liable. Being cross-examined, he said he had never examined the road sufficiently to say whether that part of it passing through his land was as nearly finished as the balance of it, or not; when he stopped the hands they had completed, or very nearly completed laying the rails of the bridge over Pearl river, one end of which rested on deponent's land; the piers only were built, and no work has been done on it since the hands were driven off, as above stated.

Henry K. Moss testified, that he was appointed a director of the Mississippi and Alabama Railroad Company on the 15th day of February, 1837, and continued to act as such until the charter of the company was repealed by the legislature; that he has examined the copy of the contract made by the company and William Petrie, for building a railroad from Jackson to Brandon, exhibited with the original bill of the complainants, and he believes it to be correct; that the company never had or claimed any right or interest in the slaves and other property purchased by Petrie to build the road, except such as they acquired by the mortgage executed to them by Petrie in pursuance of his contract; he purchased the property in his own name and for his own use, and never held them in trust or for the benefit of the company. He executed a mortgage on the slaves in favor of the company, which was subsequently cancelled and given up. In the month of December, 1839, there was a final settlement of accounts between Petrie and the company, and after that time the company did not claim, nor did they have any interest of any kind in said slaves. At the time of the settlement the company were indebted to Petrie, and he agreed to release the balance in his favor, if they would come to a final settlement with him and release him from

Digitized by Google

his contract. They agreed to do so, provided F. H. Petrie would undertake to complete the road for $15,000, and upon F. H. Petrie's agreeing to do so, the final settlement with William Petrie was made. William Petrie worked upon the road in pursuance of his contract for two years and a half, or more, when he was forced to quit in consequence of the refusal of the owners of the land through which the road passed, to grant the right of way; he ceased to work on the road in December, 1839. Deponent cannot compute the amount of work performed, but the road was nearly completed from Jackson to Brandon. Petrie was paid in the issues of the company, except in two or three instances when good funds, to a small amount, not exceeding fifteen or twenty thousand dollars, were paid him, and he made repeated sacrifices in using the money. Deponent knows the loss sustained by Petrie on the money paid him by the company, was frequently the subject of conversation between the members of the board of directory, and sometimes at the board; and it was considered that in justice and equity, some allowance ought to be made him on account of such loss, when a final settlement took place; deponent does not think that any specific agreement was made that Petrie might procure par funds by selling the notes of the company at the market price, to finish the road. On one occasion, however, $125,000 in the issues of the company were advanced to him, for the purpose of procuring the iron, with the understanding that he was to be charged therefor only what the issues might bring in the market. William Petrie was very anxious to finish the road, and repeatedly complained that the company delayed him to his great loss. Deponent was not fully acquainted with the pecuniary circumstances of William Petrie when he made the contract to build the road, but knows he possessed some twelve or fifteen negroes, a carriage and horses, &c., and had a considerable amount of money. His letters and references proved him to be a gentleman of the first respectability, and an efficient engineer. On cross-examination he stated that he knew of no other contract between William Petrie and the company than that exhibited with the bill; that of his own knowledge he

Digitized by Google

could not say what property was embraced in the mortgage or mortgages given by Petrie to the company; he never saw them, and what he has said in reference to them was stated upon information derived from others. By reference to the minute book of the company it appears that there was a meeting of the directors on the 7th day of March, 1840, and for what was done at that meeting he refers to the copy of the proceedings given in the deposition of John T. Blow. The amount therein stated as having been expended on the railroad he believes is rather under than over the true amount. Deponent knows the company contracted with Petrie with the *bona fide* intention of prosecuting the road to completion. William Petrie commenced work in March, 1837, and quit about the 21st of December, 1839, when he was succeeded by his brother F. H. Petrie, who continued the work until March, 1840, after which the whole or a part of the negroes were employed in the cultivation of cotton. The railroad iron was bought and paid for by Humphreys & Biddle, charged by them to William Petrie, and the price of it deducted by the company from his contract; it has never been received either by Petrie or the company, and he don't know, of his own knowledge, what has become of it, though he has heard it was attached in New Orleans. He cannot state the time when, and the particulars wherein the company failed to comply with their contract, but knows they did frequently fail to do so. William Petrie gave a verbal promise that F. H. Petrie should finish the road at the price stipulated; the contract has not been fulfilled, nor has the road been delivered up to the company. In the final settlement the losses sustained by Petrie on the money paid him by the company were taken into consideration; the company were not in the habit of making up losses sustained by those who borrowed money from them, but that justice was extended to Petrie, their only contractor.

The defendants also read in evidence, at the hearing of the cause, the transcript of the record of a suit brought by Martin Gardiner against William Petrie and others, in the circuit court of Rankin county.

Digitized by Google

Upon the foregoing pleadings and facts the chancellor rendered a decree setting aside and annulling the settlement alleged to have been made on the 21st day of December, 1839, between William Petrie and the company, and appointing Jacob F. Foute a commissioner to take and state an account between the parties, and directing that the commissioner, in taking and stating the account, should charge the executors of William Petrie with all payments and advances made to him, and to allow them the value of the work done under the contract by William Petrie, to be estimated with reference to the amount to be paid for the whole work. The chancellor also appointed F. S. Hunt as receiver, to take possession of, manage and control all the slaves and other property mentioned and described in the pleadings in this cause, and hold the same subject to the final decree of the court, unless the executors of William Petrie should, within ten days from the date of the order, execute bond with such security as should be approved by the chancellor, in the penalty of sixty thousand dollars, conditioned for the forthcoming and delivery of the property, to answer the final decree in this cause. The executors gave the bond required and retained the possession of the property.

By the report of J. F. Foute, the commissioner appointed to take and state an account between the parties, William Petrie's executors are charged with $414,535 98, and credited with $216,016 80, leaving a balance against them of $198,519 18. Exceptions were taken by the defendants to the report of the commissioner, which were referred to David Shelton, who sustained several of the exceptions, and overruled the others, and reported a balance of $73,147 34 against the executors.

Upon the coming in of Shelton's report, the defendants appealed to the chancellor, who confirmed the report, and upon the final hearing it was ordered and decreed that the alleged settlement between William Petrie and the company, on the 21st day of December, 1839, be set aside, vacated and annulled, as fraudulent and void; that the complainants have and recover against the executors of William Petrie the sum of $73,147 34, with legal interest thereon from the 4th day of June, 1844, until paid, and

Digitized by Google

that execution issue therefor, to be levied of the goods and chattels which were of the said William Petrie in the hands of his executors; it was further ordered and decreed that the agreement entered into between William Petrie and the company for building the railroad, be held and considered as a mortgage upon the slaves mentioned in the complainant's bill, as well as those mentioned in the answer of the defendant, William Petrie; that the executors of Petrie pay to the complainants, within ten days from the date of the decree, the above named sum of $73,147 34, with interest, and on their failure to do so, that the mortgage be foreclosed and the property sold for the payment of the judgments due the complainants. F. S. Hunt was then appointed a receiver, to take possession of the property, &c. The defendants being dissatisfied with the final decree of the chancellor, prayed an appeal to this court. In this court the appellants moved to supersede the order of the chancellor appointing a receiver. Pending this motion it was agreed by the counsel engaged in the cause that if it should become necessary for the court, on the hearing of the motion, to investigate the whole merits of the case, that the court might decide the whole case on the full merits involved.

[The arguments of the counsel on both sides far exceeded the length prescribed by the rule of court. They consisted principally in elaborate reviews and examination of the facts developed by the testimony in the case, in connection with the charge of fraud in the settlement of the bank with Petrie. To give a synopsis of the points made would be impracticable, without overstepping the limit prescribed by the court, and violating the rule established by the legislature. The authorities cited by each counsel, are therefore only inserted.]

Hughes, for appellants.

Story's Plead. § 40, § 46; Mitf. Plead. 67, note; 2 Paige R. 396; 1 Hawks, 509; *McIlvaine* v. *Willis*, 9 Wend. 548; *Brinkerhoff* v. *Brown*, 4 Johns. Ch. R. 671; 3 J. J. Mar. 63; 1 Dana, 516; 2 Ibid. 98; Rev. Code, 201, § 25 & 26; Laws of Miss. 1838, 341, 342, 343, ch. 78; *Hogan* v. *Lucas*, 10 Peters, 400;

Digitized by Google

Smith v. *Smith*, 1 Paige, 391; *Hadden* v. *Strader*, 20 Johns. 554–556; *McDermott* v. *Strong*, 4 Johns. Ch. R. 687; *Edmeston* v. *Legree*, 1 Paige, 637; *Beck* v. *Burdett*, 1 Paige, 305; *Weed* v. *Pierce*, 9 Cow. 722; 2 Kent's Com. 232–235; *Balsford* v. *Burr*, 2 Johns. Ch. R. 166; Acts of 1840, 21, 22; Const. U. S., Art. 1, § 10; *Trustees of Dartmouth College* v. *Wood*, 4 Wheat. 518; *Payne* v. *Baldwin*, 3 S. & M. 672; *Commercial Bank* v. *Atherton*, 1 S. & M. 641; *Dyche* v. *Rigg*, 2 S. & M. 606; *Edmeston* v. *Lyall*, 1 Paige, 637; *Bank of Maryland* v. *Huff*, 7 Gill & Johns. 448.

Quitman and *McMurran*, for appellees.

1 S. & M. Ch. R. 282; 1 How. R. 560; *Perry* v. *Nixon*, 1 Hill Ch. R. 335; *Harrison* v. *Battle*, Dev. Eq. R. 537; 1 Paige R. 305; 4 Johns. Ch. R. 687; 10 Yerg. 317; 3 Munf. R. 358, 384; 8 Wend R. 339; 1 Story's Eq. Pl. 37; 1 Hill, 302; 1 Bland's Ch. R. 251, 271; 20 Johns. R. 554; 2 Stew. R. 378; 4 Cow. R. 384; 7 J. R. 477; 13 Serg. & Rawle, 25.

Evans, on the same side.

4 Johns. Ch. R. 677; 5 How. 625; 20 Johns. R. 568; 2 Rev. Stat. (N. Y.) 173, § 38; *McIlvaine* v. *Willis*, 9 Wend. 548; *McDermot* v. *Strong*, 4 Johns. Ch. R. 687; *Perry* v. *Nixon*, 1 Hill's Ch. R. 335; *Beck* v. *Burdett*, 1 Paige, 309; 2 Story's Eq. 297, § 1031; 2 Kent's Com. 582; 4 Ibid. 139; 8 Johns. R. 96; 1 Pick. 389; 4 S. & M. 153; *Ferguson* v. *Lea*, 9 Wend. 258; *Astor* v. *Hoyt*, 5 Wend. 617; *Hart* v. *Ten Eyke*, 2 Johns. Ch. R. 100; 2 Phill. Evid. (Cow. & Hill,) 200, and cases cited; Ibid. 205, 206.

W. Thompson, on same side, delivered an oral argument.

W. Yerger, for appellants.

Shaw v. *Lewistown T. P. Co.* 3 Penn. R. 445; *Bruner* v. *Miller*, 4 Taunt. 445; *Lucas* v. *Godwin*, Bing. N. C. 737; 2 Aikins, 427; 7 Johns. 476; 1 Shepley, 60; Chitty on Con. 78, (5th Am. ed.) and cases cited; 9 Pick. 298; 3 Johns. 528; 13

Digitized by Google

Wend. 71; 14 Johns. R. 330; Chitty on Con. 88; Angell & Ames on Cor. 117, 121, 122, 126, 165, 170, 171, 220; *Fletcher* v. *United States Bank*, 8 Wheat. R. 357; 12 Ibid. 68; 2 Kent's Com. 233; 1 Edwards R. 84, 513, 573; 6 Call, 308; 3 Cowen, 445; 3 Mason, 308; 6 Johns. Ch. R. 111; 2 Leigh, 149; 3 Peters, 114; 1 Bibb, 168; 2 Ibid. 449; 2 Randall, 442; 2 Paige, 478; 3 Dana, 5; 6 Munford, 406; Addison's R. 56; *Douglass* v. *Houston*, 6 Hammond, 162; 1 McCord's Ch. 167; 2 Johns. Ch. 312; Hopkins R. 79: 1 Bibb, 306; 2 Litt. 222; 6 Yerg. R. 185; 7 Price's Ex. R. 274; Act of 1840, ch. 2, p. 21; 4 Wheaton, 518; *Riggs* v. *Dyche*, 2 S. & M. 606; 6 Gill & Johns. 363; 7 Ibid. 448; 1 Younge R. 507, cited 1 Am. Eq. 151; *Daubney* v. *Cockburn*, 1 Mer. 624; *Whelan* v. *Whelan*, 1 Cow. R. 577; 5 Ibid. 547.

George S. Yerger, on the same side.

1 Cow. R. 711; 10 Yerger, 59, 105; *Donovan* v. *Finn*, Hop. R.; *Oldham* v. *Erwin*, 6 Yerg.; 7 Exch. R. 103.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This case is presented to us on a motion to supersede the order of the chancellor appointing a receiver. The chancellor also made a final decree, from which respondents appealed, so that the whole case on its merits is in this court by appeal. It is agreed that if it should become necessary for the court to investigate the merits on this motion, the decision will be regarded as settling the whole controversy, and the case has therefore been argued at length on the whole of its merits.

The record is very voluminous, and has necessarily required much time in the examination. The complainants in the court below had recovered judgments at law, for very large amounts, against the Mississippi and Alabama Railroad Company, a corporation generally known as the Brandon Bank. Executions issued on these judgments, which were levied on a number of negroes, by the sheriffs of Rankin and Hinds counties. William Petrie claimed the negroes, and gave bond to try the right at law, but before the trial the complainants filed their bill, seeking

Digitized by Google

to transfer the controversy to the superior court of chancery, and, by the aid of that court, to have the property subjected to the satisfaction of their executions, on the ground that the company had an equitable interest in it. It is charged in the bill, that Petrie's claim originated in a fraud so complex, that the aid of a court of chancery is necessary to detect it; that the directors, who are made defendants, managed the affairs of the bank in a faithless manner, and used it as the means of acquiring fortunes to themselves, the negroes in question constituting a part of the property of the bank, and that they combined with Petrie and others to create false claims and titles to the property thus acquired, that they might abstract it from the creditors. To accomplish this object, they had combined with Petrie to defeat the title of the bank, by causing the books to be sent away or mutilated so as to destroy the evidences of fraud; that Shelton and Petrie also used their influence in sending off witnesses, so that a fair trial could not be had at law; that these negroes were purchased with the money of the bank, but subjected to Petrie's claim under pretended articles of agreement entered into between Petrie and the bank, in reference to the construction of a railroad from Jackson to Brandon. The substance of the agreement is set out, and it is made an exhibit to the bill. It is also alleged that when this contract was made, Petrie was very poor, and that he purchased the negroes with the money, or on the credit of the bank, and instead of investing $100,000, he laid out $159,000 for negroes, paying nothing out of his own pocket; that from poverty he arose to affluence without paying anything. The bank has paid Petrie $442,755, or about $238,755 more than the amount the road was to cost, no part of which has been finished; Petrie worked about two years, and then abandoned the road entirely; that Petrie's claim being fraudulent, the property is subject to the mortgage which he agreed to give. The prayer is, that an account may be taken between Petrie and the bank, and after allowing him a fair compensation for his labor on the road, that he be decreed to pay the balance to the complainants, and that the mortgage be foreclosed; that the contract be set aside, and for such other and

Digitized by Google

further relief as the complainants may be entitled to. There is also a prayer that the defendants may each answer all the allegations of the bill, and also the special interrogatories propounded, thirty-one in number.

Petrie, in his answer, denies all fraud; admits that he purchased the negroes with money furnished by the bank, as it was bound to do under the contract, and avers that he purchased them as his own property, and paid the amount advanced him by work on the railroad; he admits that the road is still unfinished, but says that it is owing to the fault of the bank in not furnishing funds as it was agreed, and in not procuring the right of way; that he was anxious to have completed the road, but was prevented from doing so for want of the necessary funds, and by landholders on the road, who had not received anything for the right of way. He denies that he received the amount stated in the bill, or more than he was entitled to, and exhibits his account with the bank, by which it appears that he received $298,021, which sum he avers was mostly paid in the issues of the bank, then much depreciated, and that he suffered great losses in consequence thereof. He finally relies on a settlement with the corporation, made in December, 1839, by which he was discharged from the obligations of his contract, his mortgages cancelled, and his brother substituted as a contractor to finish the road, for which he was to receive the sum of $15,000. The answers of the other defendants who did answer, do little else than to deny the frauds charged.

Proof was taken on both sides, and the release or discharge of Petrie of December, 1839, was set aside, an account ordered, and a final decree rendered for $73,147.

As the transactions between the Brandon Bank and Petrie are exclusively the subject of this investigation, it is necessary that the conditions and stipulations of the contract out of which these transactions grew, should be noted. It would seem that there was another corporation in existence, created for the purpose of erecting a turnpike or railroad from Jackson to Brandon, called the Brandon Railroad and Bridge Company, which joined in the contract made with the Mississippi and Alabama Railroad

Digitized by Google

Company by Petrie. A previous contract had been made between Petrie and the first named corporation, to build a bridge over Pearl river, and a turnpike over the low ground adjacent thereto. It seems to have been the object to merge the first contract in the second, or at least to make it part of the second. Petrie agreed in the last contract to do all the grubbing, grading, &c. necessary to the completion of a railroad from the depot lot in Jackson to the western bank of Pearl river; and from the termination of the bridge on the east bank to Brandon; to furnish all the materials, including iron; to put down the whole superstructure, with the necessary turns-out, turning platforms, side roads, water stations, road crossings, &c.; to build a frame warehouse and engine house at Brandon, and to furnish a locomotive engine of the most approved construction, a tender and eight cars, and to put the road in complete operation. This contract was not to be so construed as to include the building of the bridge over Pearl river. After stating the width of the road, the contract proceeds to recite that the Jackson and Brandon Railroad and Bridge Company had abandoned their scheme, and thereby released and conveyed to the Brandon Bank their rights and privileges, timber, &c. on the track.

In consideration of Petrie's covenant, the bank agreed to pay him $204,000, and an additional sum of not exceeding two dollars per cubic yard, for excavating rock, the first payment of $ to be made within one month after the commencement of the work; the other payments at intervals of about thirty days, as money might be required for the prosecution of the work, and for the purchase of iron and an engine, of which Petrie was to determine. Besides the above-mentioned terms of payment, the bank agreed, at the expiration of thirty days, to invest Petrie with power to draw bills of exchange on the bank, for $100,000, in instalments of $20,000 each, which sum was to be applied in the purchase of slaves to work on the road, who were to be mortgaged to the bank, with all other property owned by Petrie, to secure the performance of the contract. The work was to be commenced in one month, and finished within two years, and if sooner finished, Petrie was to have the right to the use of it until the time expired.

Digitized by Google

It was also understood that if Petrie failed to use diligence and energy in the prosecution of the work, or should fail to give assurances that he would complete it, the president of the company was invested with power to declare the contract abandoned, and to re-let the work, which declaration should exonerate the bank from liability, and subject Petrie to damages.

By the contract with the Bridge Company, Petrie agreed to erect a bridge over Pearl river, of a given description, with two tracks, one for the railroad, and another for ordinary use, for which he was to receive $37,500. He was also to construct a road from the termination of the bridge, in an eastwardly direction, to the termination of the swamp, and to build all necessary bridges, for which he was to receive for the embankment, forty-four cents per cubic yard, and for the bridging ten dollars per foot lineal.

The discharge set up by Petrie is contained in certain resolutions adopted by the board of directors, by the first of which William Petrie was released from that part of his contract, by which he had obligated himself to furnish a locomotive engine, the price thereof, $7000, to be placed to his credit. By the second resolution, the cashier was required to cancel the mortgages given by Petrie. The third contains a preamble stating that the company were under obligations to furnish Petrie with a certain amount of par funds, to enable him to complete the road, and being unable to do so, therefore it was resolved that Petrie be requested to finish the road at his own expense, and retain the use of it until the profits should re-imburse him for any balance that might be due after the completion of the road.

A difference of opinion seems to exist between counsel, in reference to the construction of the contract, in one important particular; that is, whether Petrie was to receive the sum contracted to be paid him by the Bridge Company, in addition to the sum of $204,000. The parties to the first contract joined in the second, which refers to the first contract, and all the rights acquired by the first, were assigned or transferred by the

Digitized by Google

second, and it was therefore made a part of the second contract. The Brandon Bank was substituted in the place of the Bridge Company, to carry out the original contract; to receive the benefit resulting from its performance, and of course took upon itself the obligation to pay for the work. There is one clause in the contract which declares that the Bridge Company had abandoned the scheme, and that all the rights and privileges were assigned to the Brandon Bank. The president, and directors of which, thereby contracted with Petrie "to construct the railroad aforesaid, from the points aforesaid, in the manner and form aforesaid." The whole of this clause seems to refer to the contract between Petrie and the Bridge Company, and to adopt its provisions as the contract between Petrie and the bank. Besides, it is expressly stated in the second contract, that the building of the bridge was not included. Petrie then was to receive $204,000 for the railroad; an additional sum for excavating rock, which is charged in the accounts at $4584. He was also entitled to receive for the bridge the sum of $37,500. If he proceeded to work on the turnpike, which he had agreed with the Bridge Company to construct, then he was entitled to be paid for embankments and bridges, according to that contract. On this last point the case is involved in some doubt. The amount claimed for embankments and bridging, is $29,709, besides an additional sum of $6000, on account of a debt due him from the Bridge Company. The aggregate amount of these several sums is $281,783. It seems probable the turnpike was to be finished, as the bridge was to be built with a partition, one side to be used for ordinary purposes of travel, and the other for the railroad. The clause of the contract, too, above referred to, seems to embrace the whole of the contract as made with the Bridge Company. It follows that Petrie was to have received, for completing the work, an amount much beyond that assumed by the complainant's counsel as the true one. Having settled, then, the construction of the original contract between the parties, we proceed to the contract of settlement and discharge, because, if that be valid, it is conclusive, and we need not inquire how far the first engagement has been

Digitized by Google

performed, as the discharge must be considered as an admission of performance, or a waiver of non-performance — a final adjustment of the whole matter.

First, then, as to the legal effect of the contract of settlement, and second, as to the evidence of fraud on which it is attacked.

First, it is contended that the release was not made with due solemnity, so as to be binding. The doctrine is now entirely exploded, that corporations can contract only under their corporate seal. They may contract by vote entered on the books of the corporation, and binding contracts may be implied from corporate acts, without either a vote, a deed, or writing, and they are bound by all contracts made by their agents within the scope of their authority. 2 Kent's Com. 5th ed. 288 to 292. It is said, in an approved treatise on the law of corporations, that "the course of modern decisions seems to place corporations, with regard to their mode of appointing agents, and making contracts in general, upon the same footing with natural persons. They may appoint all their agents, and make all their contracts by deed; but are no more compelled so to do than individuals." Ang. & Ames, 110. So far, then, as the resolutions go, which were adopted by the board of directors on the 21st of December, 1839, they are undoubtedly binding; but there is a part of the contract which does not appear in the resolutions, to wit, that F. H. Petrie should be substituted as a contractor to finish the road, instead of William Petrie, and receive the sum of fifteen thousand dollars, with privilege to retain the road until that sum should be paid him. This part of the agreement rests in parol, but is established fully by every witness who has spoken on the subject, in addition to which F. H. Petrie, with the knowledge of the corporation, did proceed to work on the road, and continued to do so for some time after this settlement. The circumstances are abundantly sufficient to raise an implied contract on the part of the corporation in favor of F. H. Petrie. It is said, moreover, by some of the witnesses, that it was intended that this contract with F. H. Petrie should be reduced to writing, but that perhaps was omitted.

Digitized by Google

The first resolution released William Petrie from his obligation to furnish an engine; the second directed that his mortgages should be cancelled; and the third, after admitting in a preamble that the corporation had failed to suply him with par funds, requested that he should proceed to finish the road at his own expense, and retain it until he should be repaid by the profits. These resolutions amount to an abandonment of the contract, by substituting new terms and conditions inconsistent with the original agreement. The last resolution, construed in connection with its preamble, left the completion of the road entirely at the discretion of Petrie. He might finish it or not, as he pleased. The understanding, however, seems to have been that the road was to be finished; but it was to be finished by F. H. Petrie, and William Petrie gave his verbal promise that it should be finished by his brother. This whole transaction, then, as disclosed by the resolutions and by the parol proof, amounted to a settlement with Petrie, and it seems to have been the action of the entire board of directors. It is spoken of by all the witnesses as one entire transaction, made by the concurrence of the directors, whilst in the meeting which adopted the resolutions. Not only then was this adjustment entered into with sufficient solemnity to make it binding on the corporation, but its legal consequence was a discharge of Petrie, and a settlement of balances.

Second, was it fradulent as to creditors? It is not one of those cases in which the fraud is apparent from the subject-matter of the contract alone, or from the circumstances and conditions of the parties contracting. If there was a device to take an unconscientious advantage of the creditors of the corporation, it must be gathered from the proof introduced in the cause, either direct or circumstantial. The superiority of a court of chancery over a court of law in the investigation of questions of fraud, consists in its power to elicit from the parties concerned, a conscientious disclosure of the circumstances, and thus to penetrate their motives. When the question depends upon the testimony of third persons, a court of law, through the aid of a jury, may accomplish all that a chancellor can. The merits of

Digitized by Google

this case do not depend upon the testimony of the parties to the record alone, but disinterested persons have been examined by both parties; of course their direct testimony must be considered as entitled to great weight in the conclusion. It is not denied, that *strong* presumptive evidence of fraud will outweigh positive proof against it. But it is not to be presumed from slight circumstantial evidence, especially when it is opposed by unquestionable positive testimony. The testimony on this subject was given in answer to the interrogatories propounded to the witnesses examined by respondents. R. G. Crozier, the first witness examined, states that he does not believe there was any fraud in the settlement. William H. Shelton states that the settlement was fair and open, made by a majority of the directors, and that no fraud was intended or committed. He gives the circumstances of the settlement, and says that it appeared that the accounts against Petrie had been improperly kept, and amounts improperly charged to him; that upon a review of the whole matter, delays in the work, loss by uncurrent funds, &c., it was agreed, that if Petrie would finish the work, the corporation would release all claims against him; and it was further agreed, that F. H. Petrie should finish the work, William Petrie becoming responsible for his performance. Thomas J. Coffee makes identically the same statement. John T. Blow says that he had no knowledge of fraud. He was at the board when the settlement was made; that it was final and satisfactory to all parties. H. K. Moss gives the same history of the settlement as that given by the other witnesses, and states that there was no agreement for the purpose of deceiving or defrauding creditors; that Petrie was not then indebted to the company, but on the contrary the company owed him, and he agreed to relinquish the balance if the company would make a final settlement. This was agreed to, if F. H. Petrie would agree to finish the road for $15,000, and on his agreeing to do so, the final settlement was made. F. H. Petrie also states, that at the date of the settlement the corporation owed William Petrie $15,000, which sum he was to receive for finishing the road, and William Petrie was discharged.

Digitized by Google

Charles Lynch, a witness for complainants, states that he was present, and the presiding officer of the board, when the settlement was made relative to the building of the bridge and railroad; that Petrie then stated that the corporation had failed to comply with its engagements; that some excitement and warmth occurred in the investigation and settlement, and after it was completed Petrie complained that he had not been allowed as much as he was entitled to. He knew of no fraud or collusion between Petrie and the directors; and, so far as he knew, the settlement was fair and *bona fide*. George Adams, another witness for complainants, who was the attorney of the corporation, and present at the settlement, gives the same answer to the cross-interrogatory, that was given by Governor Lynch. The whole of the direct proof then, goes directly, and in the most unqualified manner, to negative the idea of fraud.

We have said that fraud may be established by strong circumstantial evidence, even against positive proof denying it; there is no direct or positive proof of fraud, but all the witnesses deny its existence; what then are the circumstances from which it can be inferred? Every case in which fraud is charged, must be determined upon its own peculiar circumstances. The forms in which it may be perpetrated, are as varied as human ingenuity is boundless. It is odious to the moral sense of mankind, as well as to the law; hence it is seldom to be found where there is not some strong motive for its perpetration. The bill charges fraud on all the directors generally, and the amended bill charges that the settlement was fraudulent. If there was any such thing, it was of course committed by all the directors present at the meeting of December, 1839. There were eight members present. It is difficult to believe that these eight persons would lend themselves to fraudulent purposes, and it is still more difficult to believe that they would falsely swear that the transaction was fair, if it were not so. It is scarcely probable, either, that a device could have been practised by part of them, without detection by the others. All of these individuals have been sworn except one, and have testified to the fairness of the transaction. Most of them seem to have had so little in-

Digitized by Google

terest in the matter as to have suffered a *pro confesso*. These may be but slight circumstances, but they should not be overlooked. The great point relied on is, that Petrie received more than he was to have received for completing the work. If the directors were so regardless of their duties to the creditors, as to give him a much larger sum than he was entitled to or claimed, it might amount to a fraud in law. The doctrine is no doubt true, that a voluntary release of securities held by a corporation would be void as to creditors. But what was Petrie entitled to, and what has he received? The contract shows what he would have been entitled to on completing the work. The aggregate of the sums, under both contracts, amounts to upwards of $281,000; the various estimates of the amounts received by him, prove that it is next to impossible to ascertain the amount he did receive. He states in his answer that it was $298,021, and makes his account with the corporation an exhibit to his answer. By the 29th specific interrogatory in the bill, he was required to state, at what times and for what sums he had checked or drawn on the bank, and was also required to state all the items of money drawn for, or advanced to him. In answer to this interrogatory, he refers to the account made an exhibit to his answer, and states that it shows all the money ever received by him from the bank. This answer, being a direct response to the interrogatory, is evidence as well for Petrie as against him, and must be regarded as conclusive, unless it is shown to be false. *Alexander* v. *Wallace*, 10 Yerger, 105; *Woodcock* v. *Bennett*, 1 Cow. 711. Nor is it to be discredited, or any presumption indulged against it on account of its being the answer of a party interested; per Thompson Justice, in *Clason* v. *Morris*, 10 Johns. R. 524. On this subject, Shelton stated that he had not the control of the drafts and checks of Petrie, but from the ledger of the bank then before him, it appeared that Petrie had drawn the sum of $294,794 91, and if he was properly chargeable with the price of the railroad iron, which had been taken in New Orleans by an attachment against the bank, it would make the additional sum of $17,266 95, which, added to the sum appearing on the ledger,

Digitized by Google

swells it to $312,061 86; at the same time he stated, that by mistake of the cashier the accounts of Petrie had been improperly kept under the head of "Railroad Expenditures," and that in this way improper charges had been made against him. Petrie was bound to pay for the railroad iron, and was therefore responsible to the bank for it, but he was certainly not chargeable with railroad iron which was sold under an attachment against the bank in New Orleans; so that Shelton's testimony places the sum received by Petrie near his own admission. It cannot be doubted but these charges, made in the books of the bank, were for the nominal and not the actual value of the money. The witness also mentioned another sum of $125,000, given to Petrie when he was about to start to New Orleans, which he was authorized to sell at its market price, which he accounted for at eighteen cents in the dollar, making twenty-two thousand five hundred dollars. The book referred to by the witness was an unsafe reliance, as it is stated by several of the witnesses that the accounts were improperly kept, by making improper charges against Petrie.

The witness, Bullock, appended to his deposition an account or statement of Petrie's liabilities, at which he placed the sum at $451,556 11. He was book-keeper and teller, and states that the account contained improper charges to the amount of 40 or $50,000, and mentions several items improperly charged to Petrie. This account contains also the charge of $125,000 spoken of by Shelton, which Petrie was authorized to sell at what it would bring, which was settled for at eighteen cents in the dollar. This reduces the account $102,500. The railroad iron is also charged at $17,266. If we add to these sums $40,000, the lowest estimate made by the witness for improper charges, we have an aggregate of $159,766, which, deducted from the amount of the account, shows the sum received by Petrie to have been $291,790, being less than Petrie admits he received. The testimony of this witness then corroborates the answer of Petrie.

T. J. Coffee, in his deposition, says nothing as to the amount received by Petrie, except to refer to a paper marked C, at-

Digitized by Google

tached to Blow's deposition. By reference to this exhibit, it is found to be a resolution of the directors, in which it was determined to be inexpedient to abandon the project of completing the road, after having expended upwards of $300,000 on it. This resolution is in round numbers; it does not refer to items, and proves nothing. It was at best but a rough estimate of the expenditure.

Blow also states that improper charges were made against Petrie, and in answer to an inquiry as to the amount received by Petrie, he refers to exhibit D to his answer, which is not found attached. He states that at the settlement made in 1839, Petrie brought the bank in debt about $30,000, but for the sake of a settlement, he being in bad health, he relinquished his claim; and he also states that the cost of a locomotive was then charged against him. Moss makes the same statement as to the balance in favor of Petrie at the settlement. In all this mass of testimony, there is nothing which enables us to fix, with certainty, the amount of money received by Petrie, at a sum which varies much from his own statement. The accounts seem to have been so loosely kept as to place certainty out of the question. We cannot say that the answer of Petrie is satisfactorily disproved, and must therefore adopt it as evidence of the true amount.

But it is argued that this amount was received by him in par funds, and that it was more than he was entitled to for the completion of the road, which is still unfinished. The witnesses all say that he received his payments in the notes of the bank, which were greatly depreciated, except 10 or $15,000, which he received in par funds. They unite also in stating, that he sustained great losses in consequence of being compelled to receive depreciated currency. It is also said, that by his own account, before referred to, it appears that he received the amount therein stated in par funds. This is a mistake of counsel. It is stated positively in the answer that the sum received by him was mostly in the notes of the corporation, which were at a discount; that he received them at par, with a few exceptions noted in the account current made an exhibit to the

Digitized by Google

answer. This is the same account before noticed, and by a reference to it, deductions are only made in two or three instances on account of uncurrent money, one of which is the check for $125,000, which he was authorized to sell at its current price, for which he has charged himself $22,500. The answer in this particular is fully sustained by the witnesses, all of whom testified that his payments, with a very small exception, were received in the notes of the Brandon Bank, and that he sustained heavy losses and suffered great inconvenience as a consequence. The contract was for the payment of so much money; it was not a compliance with it to pay in depreciated paper; the bank was bound to make good the amount lost by depreciation. The current value of the notes at the time received, was the extent of his legal obligation as a debtor to the bank.

Another circumstance, from which fraud is attempted to be inferred, is the extravagant allowance made by the directors to Petrie, on the final settlement for damages, as an evidence of which the paper called his "approximate estimate of the advanced cost of constructing the Jackson and Brandon Railroad, Turnpike and Bridge, on account of the failure of the company to comply with their engagements," is referred to. This document was the subject of severe comment, and certainly it bears some evidences of extravagant and even unfounded estimates. But some of the charges are undoubtedly such as might well be made under the circumstances; for instance, $39,000 loss on $260,000 of uncurrent money. Loss of $4000, by being compelled to purchase on credit at advanced prices, in consequence of the failure to supply par funds at the time agreed on; and the loss arising from a year's detention over the time the work was to have been finished. If these losses were occasioned by the bank, justice required that some compensation should be made. But a complete answer to the argument on this subject is found in the fact that the directors did not allow all of this claim. Blow and Moss, and perhaps other witnesses, state that the directors refused to allow all the claim for damages. Governor Lynch proves that Petrie complained very much,

Digitized by Google

after the settlement, that his claim had been unjustly curtailed. And notwithstanding part of his claim was rejected, it seems that he still brought the bank in debt. Moss and Blow both say that there was a balance due him of $30,000, and this too, after charging him with the price of a locomotive engine, which sum he agreed to relinquish, for the sake of a settlement and discharge. Shelton says it was agreed, if Petrie would finish the road, the company would release all claims, and allow him $15,000, with liberty to receive the profits until they should pay that amount. Coffee says the company acknowledged that it would be indebted in the sum of $15,000, when the road should be finished. It seems then that Petrie had preferred claims against the company, some of which, at least, were founded in justice. He had been engaged in the performance of a heavy contract, and was occupied nearly a year longer than the time agreed on. He had worked on with the approbation of the company, which was making its payments in depreciated paper. He had obstacles to encounter from the owners of land, and from other causes. Is it so remarkable that unforeseen claims should have originated, and is it an evidence of fraud that in the settlement of these claims, mutual concessions should have been made, for the sake of compromising the difficulty? It is but the common case of a job of work costing more than was anticipated. Even supposing that he was allowed more than he was strictly entitled to, that of itself is not a fraud; there must be a device to injure others, or the act must be so grossly extravagant and wasteful as to amount to fraud in law. Petrie had received about $298,000; all of that sum, except 30 or $40,000, was in depreciated paper. Judging from what the witnesses say, he must have lost near $30,000, or perhaps even over that sum. This item alone reduces the actual amount received by him, considerably below the price of the work. It is stated also that the directors had previously determined to make up his losses in this respect. The extravagance of the allowance, then, is certainly not so glaring as to furnish evidence of fraud.

It was urged that there was too much informality in making

Digitized by Google

this settlement for it to be valid; that accounts in writing were not made out on both sides. Some of the witnesses testify that accounts on both sides were presented. We must then suppose the fact was so. But suppose it were not so, what better guide was there to a correct understanding and full disclosure of the mutual liabilities than the books of the bank? If they were correctly kept, they contained every item of charge and discharge. An account taken from the books cannot be better than the books themselves. Such a circumstance, then, would prove nothing.

But it was assumed in argument, that fraud was conclusively established by the circumstance that Petrie engaged in the contract a poor man, and abandoned it unperformed, in something less than three years, with slaves worth $136,000, and other property, for which he owed nothing. This position is not altogether sustained by the testimony. If it were so, it would be a suspicious circumstance, but still not conclusive. To hold that such a fact was conclusive evidence of fraud, would be to establish a rule destructive of all speculations, and dangerous to many of the property-holders in this state. But as this is a legitimate argument in the pursuit of the object, it becomes necessary to look at all the prominent facts in the case, that we may be certain this sudden change of condition cannot be accounted for on fair principles. On the two contracts Petrie was to have been paid $281,000, in round numbers, at such times as he might require it. Of this sum he invested $136,000 in slaves, being $36,000 more than he agreed to invest in that way. These slaves, when purchased, belonged to him individually. Every witness states that he never bought any for the company, and that the company had no right or interest, whatever, in the slaves, except to have them mortgaged as a security for the performance of the contract. Mortgages were given on part of them, but afterwards cancelled. With these slaves Petrie commenced the work on the road, having still $145,000 to furnish materials, and to support his slaves. The road was to have been completed in two years, but he was engaged nearly three. The whole of the grading was done; the

Digitized by Google

rock excavated; the embankments made, and the wood work all laid, ready for the iron, except about a half or three quarters of a mile. The materials for the houses and bridge were ready, though not on the ground where they were to be erected. The piers or butments of the bridge over Pearl river were built, and in short the road was so nearly completed as to require but $15,000 to finish it, exclusive, as we must suppose, of the railroad iron, valued at $17,000. And, if we believe the witnesses, Petrie was still anxious to finish the work. Was there any fault or fraud, on his part, that it was not completed according to the contract? The witnesses all say that the fault was not his, but that it occurred by the failure of the company to supply him with par funds, or by the failure to procure the relinquishments to the right of way. These are assigned as reasons, and the proof is too clear to admit of doubt, that much the largest part of the money he received was in depreciated notes. It is equally well established, that he was impeded in his progress, for want of the right of way. Counsel have relied on discrepancies in the statements of witnesses on this subject, for the purpose of destroying the effect of their testimony. We see nothing that will justify us in disregarding the evidence. That the company failed in another important particular, is beyond question. The iron was purchased for Petrie, but attached for the debts of the corporation, and sold. Although the bank was under no obligation to purchase it for him, yet it was under obligation to furnish him such funds as would buy it. This, it seems, it could only do by applying part of a sum of money then in the hands of its merchant in England, which was accordingly done, and it should have been relieved by the bank from the attachment for its debts. Here we may remark, that there was no impropriety in Petrie's asserting title to it under such circumstances. Notwithstanding these failures, it was assumed in argument that the company had complied with all its engagements, as a proof of which it is said that in twelve months he had received a sum of money equal to the whole amount of the contract; at the expiration of two years he had received $273,410, and by the 18th of

Digitized by Google

November, 1839, the full sum of $298,000, in par funds, according to his own answer. We repeat, the answer does not admit the reception of par funds; and even if these amounts had been received at the times specified, still the instalments may not have been paid at the times they were required. Although a gross sum may have been received during the whole year, yet great inconvenience may have resulted from a failure to pay at the particular times it was required. But it is not true that Petrie derived all his wealth from the profits of this job. By a specific interrogatory he was required to state what he was worth when he commenced the work, in answer to which he estimated his wealth at $20,000. This answer is corroborated by the witnesses, besides which we have positive evidence that he borrowed near $30,000 from his brother, and gave a mortgage to secure the payment. We have, then, to deduct about $50,000 of his fortune from the total amount; and the balance is what he made by the job. Taking into consideration, then, the total amount he was to have been paid for the job, and the means he took to accomplish it, it would naturally be expected that he must have left it with a number of slaves. Then, when it is remembered that about $50,000 were derived from different sources, the circumstance of his wealth loses much of its force, as an evidence of fraud. Besides, it may have been, and probably was, a very good bargain on his part; but it was not on that account fraudulent. He may also, on the settlement, have been allowed a few dollars more than he was entitled to; that would not vitiate the contract. A court of chancery cannot interpose, merely because the bargain was imprudent, or because a party may have been paid something more than he was entitled to. As inadequacy of price will not vitiate on the one hand, neither will exorbitancy of price vitiate on the other. There must be some ingredient of fraud.

Much reliance was also placed upon the letter of Petrie to Shelton as president of the corporation, in which it is said he represents the negroes purchased by him as the property of the

Digitized by Google

company. We do not understand the letter as containing any such admission. It seems to have been a reply to a request made of Petrie to state how much had been expended on the railroad. He gives the items for which the expenditures had been made, but does not represent these items as the property of the bank. He says for slaves purchased, so much had been expended, but does not disclaim his own title to the slaves. The bank was, according to this letter, so much out of pocket for the road, but it could not own both the road and the slaves. If it owned the slaves, it was not so much expended, but so much changed from money into property, and if the bank charged itself for the expenditure and owned the property, it was entitled to be credited for the property, so that the accounts ought to have been balanced. Yet we find, in the commissioners report, an amount stated as having been expended on the road. If the negroes belonged to the bank, the letter was not true, because their value had not been expended by the bank on the road, but was so much expended in property. If, on the other hand, the negroes were Petrie's property, then the bank had expended their value on the road.

A resolution of the board of directors, adopted on the 10th of September, 1839, was adverted to in the argument as an evidence of fraud. It was passed about the time Petrie was to start to New Orleans to release the railroad iron, and its object was to prevent his arrest. It declares that the bank would not consider Petrie its debtor until the road should be finished, and then if any balance should remain due, he should be at liberty to pay in the notes of the bank. The resolution, unexplained, amounts to but little, and the explanation does not tend to establish fraud as to these complainants. It proves a profuse disbursement of the notes of the bank in an effort to release the railroad iron, as it was then that Petrie received the $125,000 check, which, considered at par, would have made Petrie debtor to the bank. How far this transaction might have been considered fraudulent as to New Orleans creditors, on whom it was intended to operate, we need not inquire. This was evidently the resolution referred to by complainant's witnesses, King and Pucket, and explains their testimony.

Digitized by Google

We have thus noticed the positive testimony in reference to the charge of fraud in the final settlement, and also the facts and circumstances from which it is attempted to be inferred. It may have been a fraudulent settlement, although we cannot perceive it. We are to be guided by the direct or positive proof, and by such legitimate deductions from the circumstances as they seem to us to warrant. There may be much in the transaction calculated to excite suspicion, but we cannot yield to mere suspicions against positive proof uncontradicted and unimpeached.

A few remarks will be added in reference to the propriety of the decree on the case as it was supposed to have been made out. The complainants are judgment creditors, seeking to subject equitable assets of the bank, or a debt due to it, whichever might turn out to be the case, and to have them appropriated in satisfaction of their judgments. They charge fraud in the original contract by which the bank acquired the equity, and seek to vacate it. Of that, however, there is no proof. They then charge that by this contract a mortgage was to have been given on negroes and other property, which vested an equitable interest in the bank, and, being creditors, that they have a right to the benefit of this mortgage. The contract examined sustains the charge thus far; Petrie did agree to buy slaves and to give a mortgage on them as a security for the performance of the work. When a party agrees to make a security in future, that is construed in equity as an equitable mortgage. But Petrie complied with the contract in this respect by executing the mortgage; the equitable mortgage was merged in this, and when the contract by which the express mortgage was cancelled was rescinded by the chancellor, it restored the mortgage. It would seem, therefore, that the bill should have been framed and the decree made on the mortgage. But suppose all was right in this respect, and we are not disposed to controvert it, how is the decree sustained by the equitable mortgage? That mortgage was not given to secure a debt or money advances to be made to Petrie, but to secure the performance of a covenant, the non performance of which sounded in damages merely.

Digitized by Google

The mortgage was not necessarily forfeited because Petrie did not complete the work. The right of the bank under this equitable mortgage, depended upon the amount of damages it sustained in consequence of the non-performance of the work; to that extent the mortgage was a security. How were the damages to be ascertained? By arbitration, as agreed on in the contract, or by the verdict of a jury. A court of chancery has no power to assess damages. It was a contract containing mutual undertakings; in a suit at law the company would have been compelled to prove the performance of conditions, otherwise no damages could have been recovered, and of course the mortgage must have remained inoperative. In common cases of a mortgage of personal property, it is said that on forfeiture the right becomes absolute in the mortgagee; but in this instance what was a forfeiture? It was a thing unascertained.

But what was the professed foundation of the decree against Petrie in this instance? An account was taken to ascertain how much money he had received over and above the amount he was entitled to; whatever that was, on the principles of the decree, he was debtor to the bank. The commissioner reported him in debt so much; the report was confirmed, thus declaring him to be a debtor to the bank, and a decree passed for the amount, which is also a decree of foreclosure, and directs that in case of non-payment, the property shall be sold. Now Petrie had given no mortgage to pay a debt. The contract made no provision for advances beyond the amount agreed on, nor did it make any provisions for security in case such advances should be made, and the contract must govern. If, then, Petrie did receive more than he was entitled to, he was debtor to the bank, not by mortgage, but by simple contract. With all deference to the opinion of the chancellor we cannot see how a decree of foreclosure could follow. If a man give a mortgage to pay one debt, or to do a specific thing, can that mortgage be foreclosed for the non-payment of another debt not intended to be secured, or the non-performance of another thing? It would seem not. If this view of the subject be correct, the negroes were not involved in this controversy. The chancellor in

Digitized by Google

inquiring whether Petrie's liability was such as might be pursued in equity, and whether the complainants were authorized to file a bill for that purpose, says, "it seems now to be the rule in England, that in order to render a conveyance void, made by a debtor, it is necessary that the conveyance should embrace property liable to be seized by execution at law, and applied to the payment of the debts of the grantor. As a consequence of this doctrine it has been held, that a voluntary transfer of stock, choses in action, or other property not liable to be taken in execution, is good, notwithstanding the provisions of the statute of 13 Elizabeth." Without acknowledging this principle, we would merely remark that the most that was transferred or relinquished by the contract which was set aside, was an undefined, unascertained, and uncertain claim for damages, and an alleged balance of indebtedness.

We have laid the account taken in this case out of view, as that could not be brought in to aid the decree which preceded it. The case has been considered as it was presented to the chancellor before the decree setting aside the contract of discharge. If that was wrong on the pleadings and proofs, then the account was improperly ordered, and its result cannot change the prior aspect of the case. Our conclusion on the merits of the case, renders it unnecessary for us to say anything on the technical questions discussed, and equally unnecessary that we should express any opinion as to the kind of funds Petrie was bound to pay.

As counsel have agreed in this case that an investigation on the merits should be final, and that investigation having been made, the decree is reversed and the bill dismissed.

Mr. Justice THACHER.

I have participated in the examination of this case, and concur in the judgment of the court as contained in the opinion of the chief justice.

Digitized by Google

Hackeliah H. Leggett *vs.* John Morris, Jr.

Where a party wishes to obtain relief in equity against a judgment recovered against him in an action at law, to which he had a valid legal defence, though it was unknown to him at the time the judgment was rendered, it will not be sufficient to allege in his bill that the grounds of defence were not known to him at the time of the trial at law; he must also aver that he could not have obtained such knowledge by the use of ordinary diligence.

L. filed his bill to be relieved against a judgment at law recovered against him by M.; he alleged that he was in partnership with C. in erecting a saw-mill; that a settlement and dissolution of the firm took place, and C. agreed to pay all the debts, the debt to M. being one of them; that the note on which the judgment was recovered, was executed after the settlement, but antedated, and the signature of the firm of L. & C. attached without authority from L. It was also alleged that M. knew that C. had undertaken to pay all the debts of the firm, and did not object. In an amended bill, it was stated that L. had no knowledge of the material facts set forth in his original bill until after the judgment at law. M. filed a demurrer to the bill, and amended bill, which was sustained by the court below, and the bills dismissed. *Held*, that the bills did not make a sufficient showing for relief in a court of equity, and that the demurrer was properly sustained.

Error, from the circuit court of Adams county; Hon. C. C. Cage, sitting in chancery.

Hackeliah H. Leggett filed his bill on the chancery side of the circuit court of Adams county to the May term, 1843, alleging that at the November term, 1842, of said court, John Morris, who is not a resident of this state, recovered a judgment against him for the sum of $268 32 and $18 93 costs; that an execution had been issued on said judgment, and was then in the hands of the sheriff of said county, who would levy the same on the property of complainant unless restrained, &c.; that said judgment was founded on a promissory note purporting to be executed by complainant, and one Anson Cowles, by the style of "Leggett & Cowles," payable to John Morris;

Digitized by Google

that the note was never presented to complainant for payment until the spring of 1842, four years after its date. The bill further alleged, that in the fall or winter of 1836, complainant and Cowles agreed verbally to enter into a copartnership to erect a saw-mill at Vicksburg; that the agreement was informal in many particulars, but it was distinctly understood that each was to advance equally the necessary sums of money to carry on the work; that each should employ a master workman at his own cost to direct the erection of the mill; that complainant, in pursuance of the agreement, employed John W. Rice, a master workman, and he also spoke to John Morris to work on the mill. The bill further charges, that within three or four months after the verbal agreement was made, complainant had drawn up articles of partnership in pursuance of the general provisions thereof, and the said Cowles utterly refused to sign them; that complainant had in the mean time advanced large sums of money for the purchase of necessary implements, lumber, &c., for carrying on the intended work; that complainant found that Cowles was extravagant and dishonest, and utterly failed to advance any sums of money as he had promised; that he became alarmed, and insisted on Cowles leaving the concern, or assuming the conduct of it himself and paying complainant the sums of money he had advanced; that on the 14th day of February, 1837, a final settlement and dissolution of the firm took place, when Cowles agreed to take all the implements and other property which had been purchased; and it was distinctly understood that Cowles should pay all the workmen and all debts incurred in and about the mill; and he exhibits with his bill the written agreement entered into when the firm was dissolved. That at the time of the settlement John W. Rice and William Smith refused to look to Cowles for payment of the debts due them, and complainant therefore paid them; but Morris was present during the settlement and made no objection to abiding by the agreement. The bill further charges, that at the time the agreement to enter into partnership was made, there was no authority given to Cowles or complainant to execute notes or bills in their joint names. It also charged, that about that time

Digitized by Google

Cowles was engaged in building a dwelling-house, in which complainant had no concern, and that Morris worked on the dwelling-house. And complainant verily believed that most of the time Morris was at work it was for the individual benefit of Cowles; and that the work he did on the mill, if any at all, was worth very little. That shortly after the settlement between Cowles and complainant, Cowles called all the workmen together, except Rice and Smith, and had a settlement with them; that the note on which said judgment against complainant is founded, was written by Morris after the 14th day of February, 1837, the day of the final settlement between Cowles and complainant, and fraudulently antedated, to wit, on the 4th day of February, 1837, so as to bind complainant; that Morris and Cowles both well knew that the note was antedated and they colluded together to defraud complainant, and prayer for an injunction, &c. On the 6th day of June, 1843, complainant filed an amended bill, averring that the material facts alleged in his original bill, to wit, the antedating of the note and Morris's knowledge of the agreement between Cowles and himself, came to his knowledge too late to be used on the trial at law. An injunction was granted as prayed for, &c. A transcript of the record and judgment against complainant is exhibited with the bill, from which it appears that the complainant was in court and defended the action at law. At the November term, 1843, the defendant denied all fraud and collusion as charged in the original bill, and demurred to both the original and amended bills, and assigned the following causes of demurrer, to wit: "1. Said complainant has admitted the copartnership between himself and Cowles, and the power of Cowles to bind him. 2. Complainant has shown that each was to employ a master workman, and that he employed the said defendant, Morris, at his own expense. 3. An agreement made at the dissolution of a partnership by one of the firm to pay the partnership debts, does not discharge the other partner, if the former fails to pay the same. 4. Because the antedating of the note will not vitiate the contract, and because such antedating, if true and fraudulent, would only be a ground

Digitized by Google

of new trial and not sufficient to compel defendant to answer complainant's bill. 5. Because complainant has not prayed for a new trial, and prayed for defendant to answer. 6. Because complainant sets up the antedating of the note sued on at law for his equity in the bill, and at the same time defendant's knowledge of a contract between complainant and Cowles, that complainant should be discharged from payment of the money due defendant, and that Cowles should pay the same. 7. Because said bill is contradictory in this, to wit, the liability of complainant is first admitted and afterwards denied. 8. Because the allegations in said bill are indirect and sophistical, based upon a hypothesis of hearsay belief. 9. Said bill is frivolous, because the allegations in said bill contain no reasons for a defence at law or equity; and, 10. Because said bill is, in other respects, indeterminate and insufficient."

Upon a final hearing, the court below sustained the demurrer and dismissed the bill, and the complainant has brought the case to this court by writ of error.

Dubuisson and *Galtney*, for complainant in error.

Fraud vitiates everything into which it enters; and any act, however solemn, even though it be the judgment of a court of competent jurisdiction, may be set aside, if procured by fraud. *Anderson & Orne* v. *Lewis & Niles*, 1 Free. Ch. R. 206.

A demurrer being always upon matter apparent upon the face of a bill, admits the allegations of the bill, and cannot inquire into the question of fraud, which only can be done by answer, or by averment in a plea. Ibid. 197.

As a general rule, there must be an answer to a charge of fraud. Mitf. Plead. 239–278.

If fraud be charged in a bill, no matter what species of defence the respondent adopt, he must negative the allegation of fraud. *Anderson & Orne* v. *Lewis & Niles*, 1 Free. Ch. R. 206.

Again — same authority. If a bill contain an allegation of fraud, it is a general rule that the allegation of fraud must be denied by answer, whatever defence may be adopted to the other portions of the bill; because fraud gives jurisdiction, and

Digitized by Google

lays a foundation for relief; hence a general demurrer to a bill containing such an allegation cannot be allowed.

To make a stronger case: If the facts alleged in the bill are sufficient to raise a legal presumption of fraud, and the fraud be denied by answer, and the facts which conduce to prove the fraud be admitted, even then the facts must be held to outweigh the denial. *Dick et al.* v. *Grissom et al.* 1 Free. Ch. R. 437.

But complainant's bill presents a case clearly embraced within the general rule, and resting for its support upon a more solid foundation than a mere conclusion of law. For the facts, set out in the bill, are of themselves not only fraudulent, but highly criminal in their nature; and they are not denied. And whether we consider the fraud as contained directly and specifically in the facts themselves as charged, or as existing merely in conclusion of law from the facts, in either case it is fraud, which gives jurisdiction to a court of equity, and which, being unanswered and undenied, entitles complainant to the relief he seeks.

The demurrer to complainant's bill, therefore, must be set aside, and as the demurrer admits the equity of the bill, the injunction ought to be perpetuated.

Bullock, for defendant in error.

If it were true that the note was fraudulently antedated, which is by no means deducible from the circumstances, that fact would have been a defence at law.

"It is not sufficient that the defendant did not know of the grounds of defence at the time of the trial; it must appear that he could not have obtained such knowledge by the use of ordinary diligence." *Miller* v. *Gaskins*, S. & M. Ch. Rep. 525. Complainant has "shown no reason why he could not, or did not possess himself, before the trial at law, of the information which he says he has since obtained." This must be done, or equity will not relieve. S. & M. Ch. R. 525; 4 How. R. 26; 2 Caines R. 163; 18 T. R. 489.

Complainant having admitted his liability and indebtedness

Digitized by Google

to defendant, in his bill, by making an agreement with a third person to pay his debt for him, and having admitted that his supposed defence is a defence at law, equity could not extend any relief, unless he could show a mistake as to the original indebtedness, as well as his reasons for not having been diligent in procuring his testimony for a defence at law. Such a showing as has been made would not entitle him to a new trial at law. "He has shown a degree of gross negligence, that must exclude him from being heard in a court of chancery." S. & M. Ch. R. 111.

Galtney, in reply.

1. The court below erred in entertaining the demurrer; because a demurrer being always upon matter apparent upon the face of the bill, (Mitf. Pl. 277,) cannot inquire into the question of fraud; which can only be done by answer, or by averment in a plea. And as a demurrer could only apply to the bill, in the present case, for want of equity upon its face, the demurrer was badly pleaded, and erroneously entertained by the court below; there being no such apparent want of equity in the bill to authorize the putting in of said demurrer.

2. The court below erred in sustaining the demurrer. Because the bill charged fraud. As a general rule there must be an answer to the charge of fraud. *Ross & Ross* v. *Duncan et al.* Freem. Ch. R. 603; Ch. Rules, 5, 6. If fraud be charged in a bill, no matter what species of defence the respondent adopt, he must negative the allegation of fraud. *Anderson & Orne* v. *Lewis & Niles*, Ib. 206.

3. The court below erred in dissolving the injunction in this case upon a bill charging fraud, without answer.

An injunction is not dissolved when bill is not answered. *James's Adm'r.* v. *Jefferson*, 4 Hen. & Mun. 483; *Roberts* v. *Anderson*, 2 Johns. Ch. R. 204.

Per Curiam. The complainant filed his bill to be relieved against a judgment at law, in which he states that he was in partnership with one Anson Cowles, in erecting a saw-mill;

Digitized by Google

that a settlement and dissolution of the firm took place, and Cowles agreed to pay all the debts, the debt to the respondent being one of them — that the note on which this judgment was recovered, was executed after the settlement, but antedated, and the signature of Leggett & Cowles attached to it, without authority from complainant. It is also alleged that respondent knew that Cowles had undertaken to pay all the debts of the firm, and did not object. By an amended bill it is alleged that complainant did not come to the knowledge of the material facts until after the judgment at law. A demurrer was sustained to this bill, and it was dismissed.

The grounds relied on are, that Morris was bound to look to Cowles, who had agreed to pay all the debts; and that the note was made by Cowles, in the name of the firm, without authority, and antedated.

The making and antedating of the note are the only questions which could have discharged the complainant, and they were properly triable at law. The complainant was in court, contesting the suit, but never even raised this question as a defence; and his excuse is, that he did not come to the knowledge of these facts until it was too late to use them on the trial. This showing is not sufficient. In the case of *Miller* v. *Gaskins*, S. & M. Ch. R. 524, Chancellor Buckner held a similar allegation to be insufficient. He said, "it is not sufficient that the defendant did not know of the grounds of defence at the time of trial; it must appear that he could not have obtained such knowledge by the use of ordinary diligence." The complainant does not allege that he made any effort to ascertain the consideration of the note, or the time or manner of its execution. As it was made by his partner, it is surprising that some inquiry was not made as to its consideration.

The decree must be affirmed.

Digitized by Google

Ayres P. Merrill *vs.* Henry H. Bell, Administrator of Thomas Bell, deceased.

No tribunal has authority to take proof, except in a case before it, or by authority expressly conferred by commission or by statute.

If conditions which are impossible or insensible be annexed to a contract, they are inoperative and void, and the obligation of the contract remains absolute, if it be not for the doing of an illegal thing; but if any sense or certainty can be made of the conditions they and the obligation shall all stand.

Depositions taken in one suit are not admissible as evidence in another, unless both suits are between the same parties, or those who are privies in blood, in estate, or in law.

B. deposited $1235 with M. in trust, to be returned whenever, within two years thereafter, B. would make, before any tribunal having competent jurisdiction therein, good and sufficient proof, satisfactory to the administrator of E., of the payment by B. on the 15th day of May, 1837, to E. or his duly authorized agent, of the sum of $950, to apply on certain payments to be made by B. to L. in pursuance of certain articles of agreement made and entered into by B. and L., dated January 5th, 1837, whether the same shall appear to have been paid by a note or notes, or in cash: *Held*, in an action by B. against M. to recover back the $1235, that the conditions, so far as they relate to the manner of making the proof and its sufficiency, are inoperative, and B. was entitled to recover if he could prove the payment of the $950 to E., or the duly authorized agent of L., without having made any preliminary proof to a tribunal or to E.'s administrator.

In an action by B. against M., to recover $1235, deposited by B. with M., to be returned when B. should prove that he paid E. or his authorized agent, the sum of $950, to apply on certain payments to be made by B. to L. in pursuance of certain articles of agreement made and entered into by B. and L.; B. in order to prove the payment of the $950, to E. as agent of L. introduced and read to the jury certain depositions which had been taken in a controversy pending in the probate court between L. and E.'s administrator, to recover money paid by B. to E. for L.: *Held*, that the depositions having been taken in a case to which B. was not a party, and M. only a party as the agent of L., were inadmissible to prove the payment in the suit between B. and M.

Digitized by Google

ERROR from the circuit court of Adams county; Hon. Charles C. Cage, judge.

This was an action of assumpsit brought by Thomas Bell against Ayres P. Merrill, on a writing in these words:

"Received of Thomas Bell (on deposit) in trust $1235, which is to be repaid to the said Thomas Bell, without interest, whenever within two years from the date hereof, he, the said Thomas Bell, his heirs, executors and administrators, shall make and produce, before any tribunal having competent jurisdiction therein, good and sufficient proof (satisfactory to the administrators of Thomas G. Ellis, deceased,) of the payment by him, the said Thomas Bell, on the 15th day of May, 1837, to the said Thomas G. Ellis, or his agent, duly authorized, of the sum of $950, to apply on certain payments to be made by the said Thomas Bell to Rene La Roche, in pursuance of certain articles of agreement made and entered into by the said Rene La Roche by his agent and attorney, Thomas G. Ellis, and the said Thomas Bell, dated January 5th, 1837, whether the same shall appear to have been paid by a note or notes, or in cash.

"Dated October 4, 1841." (Signed) "A. P. MERRILL."

Plaintiff first declared for money "had and received," and subsequently filed an amended declaration containing three special counts on the above writing. Each count begins with a "whereas Merrill made the above writing," and then sets it out, without any statement of inducement or consideration, declaring upon it as on a promissory note; and then avers that plaintiff did, within the time prescribed, make and produce good and sufficient proof of the payment by him, on the 15th of May, 1837, to an agent of Ellis, of the sum of $950, "to be applied on account of certain payments to be made by said Bell to said Rene La Roche." It is then alleged that said proof was satisfactory to Dahlyren, one of the administrators of Ellis; that said payment was so made for that purpose, and also that said payment was so made in pursuance of an agreement made by La Roche by Ellis, his agent, and dated 5th January, 1837.

Digitized by Google

It is then alleged that by means of the premises Merrill became liable to pay $1235 on request and so promised to pay. There is no averment of any notice to, nor of any demand upon Merrill. In the first and second special counts this proof is alleged to have been produced before the probate court of Adams county, "the same being a tribunal of competent jurisdiction for that purpose." In the third count it is alleged that this proof was so produced before M. Meador, a justice of the peace for Wilkinson county.

To show that the requisite proof was produced, as required by the receipt of Merrill, plaintiff offered to read the following depositions, taken in a cause in the Adams probate court, to which Rene La Roche and the administrators of Thomas G. Ellis were sole parties, to wit: Deposition of John Philbrick, taken before M. Meador, a justice, on 10th December, 1841. Also deposition of John L. Wall, taken on 15th December, 1841, before L. K. Barber, a justice. Plaintiff then proved that these depositions were taken in said cause by his own attorney, "in compliance with and to conform to the contract sued on in this suit," and also that they were read in said suit between La Roche and Ellis's administrators. Plaintiff then introduced an account for money due to Ellis by Bell, for amount of two notes payable to James Quine, and interest thereon, and an order thereunder written by Ellis to Bell to pay the amount to Philbrick; also Philbrick's receipt thereon for $950. Plaintiff proved that this was also used as evidence in said suit between La Roche and Ellis's administrators. To the admission of the depositions and this account, &c., the defendant objected; the court overruled the objection, and they were read to the jury, and defendant excepted. Defendant then read to the court the petition filed in the probate court, in said case, between La Roche and Ellis's administrators, and the decree thereon against La Roche, and then requested the court to rule out said depositions of Philbrick and Wall, and said account, &c., on the ground that said probate court had no jurisdiction to try the matters of said petition, and so said proofs were not produced before a court of competent jurisdiction. The court refused to rule out the evidence, and defendant excepted. There was no proof, so far as

Digitized by Google

appears by the record, that any part of this evidence was satisfactory to the administrators of Ellis, but, on the contrary, the probate petition and decree thereon, above mentioned, show that this proof was not satisfactory to them; a verdict was found for plaintiff, and defendant brings the case to this court by writ of error.

Van Winkle and *Potter*, for plaintiff in error, cited, *Soria* v. *Planters Bank*, 3 How. 46; 1 Saund. R. 32, a. n.; 2 Chit. Pl. 360 361, 722; Archb. Civil Plead. 91, 153.

George H. Gordon, for defendant in error, cited, *Babcock* v. *Scott et al.* 1 How. R. 100.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

Thomas Bell, in his lifetime, brought suit against Merrill, on a receipt, in the following words, to wit: "Received of Thomas Bell (on deposit) in trust, $1235 which is to be repaid to the said Thomas Bell, without interest, whenever, within two years from the date hereof, he, the said Thomas Bell, his heirs, executors, and administrators, shall make and produce before any tribunal having competent jurisdiction therein, good and sufficient proof, satisfactory to the administrators of Thomas G. Ellis, deceased, of the payment by him, the said Bell, on the 15th day of May, 1837, to the said Thomas G. Ellis, or his agent duly authorized, of the sum of $950, to apply on certain payments to be made by the said Thomas Bell to Rene La Roche, in pursuance of certain articles of agreement made and entered into by the said Rene La Roche, by his agent and attorney, Thomas G. Ellis and the said Thomas Bell, dated January the 5th, 1837, whether the same shall appear to have been paid by a note or notes, or in cash. Dated October 4th, 1841. A. P. Merrill."

The correctness of the decision of the court below depends upon the true purport of this instrument. It is singular and ill-shapen, and cannot be construed without, to some extent, resorting to conjecture as to the state of facts which gave rise to

Digitized by Google

it, and the object the parties had in view. It would seem that a doubt or difference must have existed, whether Bell had previously, to wit, on the 15th of May, 1837, made a payment of $950 to Ellis to be applied as a payment to La Roche on a contract which existed between him and Bell, Ellis having been, at the time, the agent for La Roche; and we may infer from the records that Merrill was the agent of La Roche at the date of this receipt, Ellis in the mean time having died, as we must suppose from the phraseology of the receipt. Bell therefore deposited with Merrill the sum of $1235, to be held until he should make proof of the previous payment; then it was to be repaid to him; or, failing therein, that it was to be applied as a payment. This seems to be the sense of the instrument, and yet the condition on which the money was to be repaid requires that Bell should make proof of payment in a particular way. He was to make and produce before any tribunal having competent jurisdiction therein, good and sufficient proof, (satisfactory to the administrators of Thomas G. Ellis, deceased,) of the payment, &c." The effort to prove performance of this condition constitutes the ground of objection to the proceedings, and it is not a matter of surprise that an attempt to prove a literal performance, should have given rise to difficulties. We cannot see how Bell was to make proof before a tribunal having jurisdiction, as no tribunal has jurisdiction to take proof except in a case before it, or by authority expressly conferred by commission or by statute. Bell could not sue to recover back money which he had rightfully paid, nor could La Roche or Ellis's administrators sue him for money which had been paid; there was no liability either way. We cannot suppose that either party intended that a suit should be brought merely for the purpose of having the question judicially settled; but even if they had such a proceeding in view, a court of justice cannot be made the mere instrument for ascertaining facts for the satisfaction of parties, and for the purpose of enabling them to perform the conditions of their contracts. But the proof was not only to be good and sufficient, it was to be satisfactory to the administrators of Ellis, who were not bound to be satisfied with anything short of proof taken before

Digitized by Google

a competent tribunal, nor were they bound to be even satisfied with that. Bell had no power to compel them to be satisfied; the matter was left entirely at their discretion. We must therefore regard the condition, so far as it relates to the manner of making the proof and its sufficiency, as inoperative. The general rule is that conditions which are impossible or insensible are void, and the obligation remains absolute, if it be not for the doing of an illegal thing. Sheppard's Touchstone, title Obligation, 372, 373. But if any sense or certainty can be made of it, the obligation and condition shall both stand. By this rule we must endeavor to enforce the condition according to its sense, if it can be ascertained, rejecting only the manner of performance. The money was deposited on a trust, and it was evidently the intention of the parties that it should be repaid, provided Bell had previously made a payment of $950 to La Roche, through Ellis, his agent. The legal effect is, that Bell was entitled to recover, if he could prove the payment, without having made any preliminary proof to a tribunal or to Ellis's administrators. Any proof would be admissible that would be competent to establish the issue.

With a view to a compliance with the condition in the contract by proving the payment, depositions, which had been taken in a controversy pending in the probate court between La Roche and Ellis's administrators, in regard to the money which Bell had paid to Ellis for La Roche, were introduced, which do prove that Bell paid the money. But they were introduced for the purpose of showing a compliance with the contract; not for the purpose of proving payment to the jury on the issue joined. We have said that this part of the contract was inoperative, it was therefore not necessary to prove performance. Bell however had no cause of action unless he could prove that he had paid Ellis. For this purpose the depositions were inadmissible; they were not taken in a suit between the same parties. They are taken to be used in a controversy pending in the probate court between La Roche and Ellis's administrators, the former claiming to recover a decree against the latter for the allowance of the claim for so much money paid by Bell to Ellis

Digitized by Google

or La Roche. Bell was no party to that controversy, nor was Merrill, except as the agent of La Roche. The rule is that depositions taken in a different suit are not admissible except between the same parties, or those who are privies in blood, in estate, or in law. And they must be evidence against a party, or they are not admissible for him. 3 Phil. Ev. 572, note 438. We need not decide whether these depositions would have been competent evidence to prove performance of the contract, the purpose for which they were introduced, since that was an immaterial matter. The witnesses did prove the only point which it was necessary for the plaintiff to prove, to wit, that Bell had paid the money, but for that purpose, for the reasons already given, they were inadmissible. The material fact was established in the effort to prove an immaterial one.

For the error in admitting these depositions, the judgment must be reversed and the cause remanded.

Digitized by Google

6s 737
89 518
89 520

THOMPSON P. WARE et al. *vs.* LOUISA G. WASHINGTON.

It is not competent for the probate court to adjudicate on conflicting rights in proceedings for dower; the parties contesting the right, must be left to their appropriate legal remedies after an allotment has been made.

In an application for dower, the widow must establish the seizin of her husband either actual or constructive, at some period during the coverture, before her dower can be allotted to her.

A widow is not entitled to dower in lands which her husband held, only by virtue of a lease for ninety-nine years; such lease vested but a chattel interest in the husband, out of which the widow is not dowable.

APPEAL from the probate court of Rankin county; Hon. James Finlay, judge.

Louisa Washington, as the widow of William H. Washington, claimed by petition her right of dower in four lots in the town of Brandon, in this state, to which she avers that her husband in his life-time acquired a paramount equitable ownership. She states that his estate was insolvent, and that the lots in question had been sold at marshal's sale prior to his death.

Thompson P. Ware and William C. Harper, by petition, prayed the court to admit them as defendants to the widow's demand; as tenants in possession under an unexpired term of ninety-nine years, from the commissioners of the sixteenth section of school lands, in which the land lay.

They were accordingly made defendants. On the trial of the petition, to prove seizin in her husband, the demandant read a deed to James R. Harris, from the trustees of the Brandon Academy; by which the trustees conveyed to him a lease for ninety-nine years to the property in controversy; she read also a deed from Harris to her husband, vesting in him a similar estate to the same land.

Digitized by Google

It was proved, by various witnesses, that at the time of Washington's death, and shortly previous, he did not reside on the premises in controversy.

The defendants demurred to the evidence, for want of proof of demandant's marriage and the seizin of her husband; and the judge decreed in behalf of the demandant, and allotted the dower accordingly; when the defendants appealed, and now assign as error the want of proof of the marriage of the demandant, and of the seizin of her husband.

Ware and *Harper*, in proper persons.

The petition admits the insolvency of William H. Washington, and a sale of the property in question before his death is also admitted; thus resting the claim for dower on the statute investing the widow, in case of insolvency, with one-third of the lands, tenements and hereditaments. H. & H. 402, sec. 60. She does not succeed to the personal property, as when estate is solvent; the terms of the statute, "lands, tenements and hereditaments," contemplate real estate. Nor could she, unless by a statute of the state, be endowed of any estate inferior to one of inheritance. 4 Kent's Com. 35, 37, 38, sec. 3; 1 Cruise's Dig. 8, 37, sec. 1, p. 46, sec. 52 to 56, p. 9, 122, sec. 11.

The land of which the petition seeks dower, is lots 5, 6, 7 and 9, in square No. 2, being the whole of said square, in section 16, township 5, range 3, east, in Rankin county. The trustees of school lands in Rankin county were empowered to lease for a term of ninety-nine years, the 16th section of township 5, range 3, east, in said county. Pamph. Acts, 1830, p. 36.

The general law of 1833 extends the powers of trustees of sixteenth sections; (see Pamphlet Acts, 146,) but is not applicable to the sixteenth section in question. And the act of 1836 (see Pamphlet Acts, 392,) transfers to the trustees of Pearl River Academy, (name changed to Brandon Academy) all the powers granted by the act of 1830, cited above, and authorizing further sales, conveyances, &c. The legislation in relation to the sixteenth section, which includes the lots in controversy, is special, and the deeds (as read in evidence by the defendant in error,)

Digitized by Google

first from the commissioners to J. R. Harris, and second from Harris to W. H. Washington, are under the acts cited, and expressly create a lease for the term of ninety-nine years from 1830.

But to such estate dower does not attach; for though the lease extended to a thousand years, its character and dignity would not rise above that of personal property. Indeed, it is nothing more; and on the death of the lessee, his administrator might treat it accordingly, and sell without an order or decree of the probate court. See 2 Kent, 342, sec. 1; 5 Mass. R. 419; case of Gay, on petition; *Brewster* v. *Hill*, 1 N. H. R. 350.

The lessor is the government, and in it abides the reversionary interest. On the death of a natural person in the attitude of the government, his relict, on the expiration of the term of years, would succeed to dower; but the widow of the first, or any intervening tenant, would not. Cruise's Dig. 127, sec. 11, p. 123, sec. 15 & 16, p. 188, sec. 52.

The second error assigned is, that no evidence was adduced in the probate court to establish any marriage of the defendant in error with William H. Washington. Marriage is one of the three prerequisites to dower, and in the language of this court, in the case of *Randolph* v. *Doss and wife*, 3 How. 214, "is one of the first steps in the proof of the demandant's title." But unlike that case, the present plaintiffs in error were not silent on this point in the court below; and otherwise unlike it, they did not "proceed in the trial on the assumed proof of marriage." But as shown by the bill of exceptions, when this objection with others was raised in the probate court, no excuse or apology was shown for the omission, or any evidence whatever, of marriage submitted to the court by the petitioner. The court, in the exercise of its discretion, could and would have given leave for the introduction of that proof, had the counsel thought fit to propose it. But in the absence of any semblance of proof, without even the common *ex parte* affidavit in verification of the matters in the petition, the court below surely erred in granting the prayer of it.

Digitized by Google

Foute and *Hutchinson*, for appellee, contended,

1. That, although according to the common law, the widow was endowable only of an estate of inheritance of lands, tenements and hereditaments, of which the husband at his death or during coverture had seizin; yet, that by virtue of our statutes, the leasehold estate in question ceased to be a mere chattel interest, devolving upon the personal representatives, and not descendible to the heir; but became an inheritable estate, a freehold, a peculiar statutory estate, unknown to the common law.

On this point, they cited 2 Bl. Comm. 16, 41 - 43, 104, 107, 121, 122, 124, 143, 155; Acts of 1830, p. 36; of 1833, 99; of 1836, 392; of 1841, 127; of 1842, 130; H. & H. 402, § 60; Ibid. 351 - 353.

2. As to the question of marriage, it sufficiently appears in the record, was averred by the petition, was not denied or put in issue by the defendants, and was alluded to by the witnesses when they spoke of the deceased's family and their occupation of the premises.

Ware and *Harper*, in reply, cited

5 Ohio R. 204; 7 Ibid. 119; Swann's Stat. 289; *McLean* v. *Rockney*, 1 West. Law Jour. 300; S. & M. Chan. R. 107.

Per Curiam. The appellee filed her petition in the probate court of Rankin county, for an allotment of dower in certain lots of land in or adjoining the town of Brandon, which was resisted by the appellants, who are tenants in possession. We have decided, at the present term, that it is not competent for the probate court to adjudicate on conflicting rights in proceedings for dower, but that parties must be left to their appropriate legal remedies after an allotment has been made. But the widow must establish the seizin of her husband, either actual or constructive, at some period during the coverture. *Doss and Wife* v. *Randolph*, 3 How. 205; *Caruthers* v. *Wilson*, 1 S. & M. 527. In order to do this, she produced the deed under which her husband claimed title, and if by that her right is defeated, then of course she failed in showing a right to dower, and the judgment must be manifestly wrong.

Digitized by Google

The demandant's husband held but a lease for ninety-nine years, which vested but a chattel interest. The statute provides that the widow shall be endowed out of the "lands, tenements and hereditaments, of which her husband died seized, or had before conveyed," &c. H. & H. Dig. 351. By another provision, we find that she may be endowed of certain equities. But her husband's title was not to "lands, tenements or hereditaments," nor to any equity in them. There can be no technical seizin of a chattel interest. By the common law, the terms used in the statute have a well defined meaning, and we can find no authority in the statute to justify us in departing from their common law meaning. By the rules of the common law, the wife can only be endowed out of a freehold estate of inheritance. Clancy's Husband and Wife, 195; 4 Kent's Com. 35, 40; Cruise's Dig. Title Dower. The lease for ninety-nine years, was but a chattel real, and dower is a freehold estate, which never can be carved out of an estate for years. A lease for any definite period, is an estate for years. A lease for one year, and a lease for ninety-nine years, create an estate of the same dignity; and if a widow can be endowed of one, she can of the other. It would be absurd to say that a widow was entitled to be endowed for life, in a term which her husband had held under a lease for one year. The petitioner, then, on her own showing, was not entitled to dower in the premises. The estate was insolvent, and she could therefore claim no interest in the term as a chattel.

The judgment must be reversed.

Digitized by Google

Digitized by Google

INDEX.

ABATEMENT.

1. Our statute directs that the death of the nominal plaintiff during the pendency of a suit shall not cause its abatement; but it does not authorize the commencement of a suit in the name of a person no longer in existence. *Humphreys* v. *Irvine*, 205.
2. It is erroneous to exclude evidence that the nominal plaintiff died before the suit was instituted; for if it is shown to the satisfaction of the court that the nominal plaintiff was dead at the time the suit was commenced, the effect must be an abatement of the suit. *Ib.*
3. In an action against the maker of a note payable to a bank by the indorsee of the bank, since the statute of 1840 prohibiting assignments by banks, if the maker of the note desire to avail himself of that statute in his defence, he must do so by plea in abatement: he cannot do so under the general issue. *Hazlip* v. *Leggett*, 326.
4. Where a note is payable or belongs to a bank and has been assigned by such bank, since the act of 1840, prohibiting assignments by banks of their notes and other evidence of debt, in an action upon such assigned note, the only mode of the respondent's availing himself of the defence is by plea in abatement. *Lanier* v. *Trigg*, 641.

ACCOUNTS.

1. In an action by a physician to recover fees due him, it is not necessary that all the items of his account should be proved: where, however, the proof of the various items is not clearly made out, the physician would strengthen his proof by showing that he kept correct books and that the account was correctly copied from his books. *Hazlip* v. *Leggett*, 326.
2. L., a physician, sued the administrators of G. for medical services rendered, extending from 1836 to 1842, and proved by Dr. M. that he, (L.) had attended in the family of G. as physician during his (M's.) absence, who was G's. regular physician; that he knew nothing of the particular visits and prescriptions charged, but had seen L. two or three times at the

Digitized by Google

house of G.; that he had heard G. in his lifetime frequently say that in the absence of witness he had employed L.; and he had two or three times been called in consultation with L. at G's. house, over some of his sick family. *Held*, that the evidence was not sufficient to entitle L. to recover on the account. *Ib.*

AFFIDAVIT.

1. Whether the affidavits of jurors to establish the conduct of the jury while in the jury room are admissible, on a motion for a new trial? Quære. *Parham* v. *Harney*, 55.
2. An affidavit to procure an attachment, which avers that the debtor is concealing his goods, will not be vitiated by containing the reason of the creditor's belief of that fact. *Spear* v. *King*, 276.
3. An affidavit to procure an attachment in these words, viz.: "Said K. (the debtor) has conveyed to his brother most of his tangible effects, is greatly in debt for goods purchased as a merchant, and these debts are pressing him; that these goods K. had conveyed to his brother, who was a man of little property or responsibility; but lately come to this state; no permanent residence in it, and is expected soon to leave; that some of said goods had been boxed up, and that K. and his brother contemplated moving themselves out of this state in some short time; and that by this means K. was concealing his effects so that the claim of the creditor would be defeated in the ordinary course of law:" *Held* to be sufficient. *Ib.*
4. In order to authorize a publication against a non-resident defendant to a suit in chancery, it must appear in the record by affidavit that such defendant *is a non-resident* of the state; an affidavit therefore, merely that he is a *citizen* of a different state will not be sufficient.
McKiernan v. *Massingill*, 375.
5. An affidavit to procure an attachment, stating that the defendants are concealing their effects so that the ordinary process of the law cannot be served on them, and that the claim against them will be defeated, &c., is sufficient. *Lovelady* v. *Harkins*, 40.

AGENT AND AGENCY.

1. He who signs a bill or note in blank and delivers it to another, makes that person his agent, and authorizes him to fill it up with an indefinite amount. *Hemphill* v. *Bank of Alabama*, 44.
2. But if such agent be limited in his authority, and fill up the note with an amount exceeding his limit, the note will, in the hands of a person who has received it with a knowledge that the authority was limited, be void as to the excess. *Ib.*
3. If an attachment bond be signed by A. as agent for the attaching creditor, and be in other respects regular, the court cannot on motion to dismiss the attachment, inquire into the question as to the agency of A. *Spear* v. *King*, 276.

Digitized by Google

4. C. being sued upon three notes made by an agent, plead non assumpsit with an affidavit of its truth, and that the notes were not made by him. The plaintiff on the trial made a power of attorney from C. to the agent, authorizing him to purchase goods for C. to keep up a mercantile establishment owned by C., either for cash or on a credit, and to execute the notes of C. for that purpose. After the introduction of the power of Attorney, the plaintiff without other proof of the execution of the notes sued on, read them *without objection* on the part of the defendant, to the jury: *held*, that by permitting the notes to be thus read without objection the defendant waived further proof of their due execution, and could not, on motion for a new trial, or in this court object to a verdict against him on the ground that the notes had been improperly admitted in evidence. *Carter v. Taylor*, 367.

5. It is requisite, before a principal can be held bound by the acts of his limited agent, not only to prove the agency but also to prove that the act was done within the scope of that limited agency; thus where in an action against the principal on a note made by his agent, it is proved that agent was authorized to execute the notes of his principal in the purchase of goods for the store of the principal, it must also be proved before the principal will be liable, that the notes were actually executed in the purchase of such goods. *Ib.*

6. And if, in an action on such notes, the defendant, on proof of the execution of the power of attorney, permit the notes, without objection, to be read in evidence to the jury, it will be a tacit admission on his part that the notes were duly executed by the agent in the proper purchase of merchandize, and he will not be heard on a motion for a new trial, or in this court, objecting that such proof was not made, and that the notes were therefore inadmissible in evidence. *Ib.*

7. In an action by B. against M. to recover $ 1235, deposited by B. with M. to be returned when B. should prove that he paid E. or his authorized agent the sum of $ 950, to apply on certain payments to be made by B. to L. in pursuance of certain articles of agreement made and entered into by B. and L.; B., in order to prove the payment of the $ 950 to E. as agent of L. introduced and read to the jury, certain depositions which had been taken in a controversy pending in the probate court between L. and E.'s administrator to recover money paid by B. to E. for L.: *Held* that the depositions having been taken in a case to which B. was not a party, and M. only a party as the agent of L., were admissible to prove the payment in the suit between B. and M. *Merrill v. Bell*, 730.

APPEAL.

Where a circuit court has rendered a judgment upon a verdict on an issue from the probate court, no appeal or writ of error will lie from such judgment, it being a nullity; and if one be prosecuted it will be dismissed.

Wallace v. Wingate. 151.

Digitized by Google

ARBITRATION.

1. Whether an award, upon the voluntary submission to arbitration by the parties, made by the arbitrators, without notice to the parties, is void? *Quære? Upsher* v. *Hargrove.* 286.
2. Where a bill in chancery sets up an award of arbitrators, and traces the claim of the complainant through it, the award will be held *prima facie* good on *pro confesso*, even though the bill does not aver that the award was made upon notice. *Ib.*

ASSIGNMENT, ASSIGNOR, AND ASSIGNEE.

1. The assignment of a note secured by mortgage, carries the benefit of the mortgage along with it to the assignee. *Terry* v. *Woods*, 139.
2. Where the holder of one of a series of mortgaged notes, indorsed the note to a third person before due, and after its maturity and non-payment takes it up and becomes again the holder thereof, he will not thereby lose his recourse upon the mortgaged premises, but will be substituted again to his original rights. *Ib.*
3. A judgment may be assigned by the judgment creditor to a third party; by such assignment the beneficial interest in the judgment will pass to the party, who will have the right to use the name of the judgment creditor to enforce the execution. *Vanhouten* v. *Reiley*, 440.
4. A judgment of forfeiture against a bank, and appointment of trustees under the act of 1843, is an assignment by operation of law, of all the property of the bank to the trustees, for the benefit of creditors; which relates back to the period of the issuance of the injunction against the bank under the act, and preserves the assets and property of the bank from that time, for the benefit of the creditors. *Nevitt* v. *The Bank of Port Gibson*, 513.
5. Where a note is payable, or belongs to a bank, and has been assigned by such bank, since the act of 1840, prohibiting assignments by banks of their notes and other evidence of debt, in an action upon such assigned note, the only mode of the defendant's availing himself of the defence is by plea in abatement. *Lanier* v. *Trigg*, 641.
6. J. and R being assignees of a note payable to B., sued the makers thereon at law: the defendant plead payment and a special plea of tender; the substance of which was that though the note was payable to B. on its face, yet it was in reality the property of the Hernando Bank when made, and was by agreement to be paid in the notes of the bank, which notes, for the sum due they had tendered, six months after the maturity of the note, to the assignees. A demurrer to the plea of tender having been sustained and a trial had upon the plea of payment and verdict, and judgment rendered for the amount of the note, in favor of the assignees; the defendants, on writ of error to this court, insist upon their right to pay the judgment in the notes of the bank, by which the note was alleged to have been

Digitized by Google

assigned: *Held*, that the defendants below having permitted the suit there to be conducted by the plaintiffs as assignees of B. without question of their character in that particular by proper plea, had admitted their right to sustain their suit in that character and it could not now be questioned. *Ib.*

ASSUMPSIT.

1. In an action by a physician to recover fees due him, it is not necessary that all the items of his account should be proved; where, however, the proof of the various items is not clearly made out, the physician would strengthen his proof by showing that he kept correct books, and that the account was correctly copied from his books. *Hazlip* v. *Leggett*, 326.
2. L., a physician, sued the administrators of G. for medical services rendered, extending from 1836 to 1842, and proved by Dr. M. that he (L.) had attended in the family of G. as physician during his (M's.) absence who was G's. regular physician; that he knew nothing of the particular visits and prescriptions charged, but had seen L. two or three times at the house of G., that he had heard G. in his lifetime frequently say that in the absence of witness he had employed L., and he had two or three times been called in consultation with L. at G's. house, over some of his sick family: *Held*, that the evidence was not sufficient to entitle L. to recover on the account. *Ib.*
3. The plea of set-off to an action of assumpsit does not exist in this state, and if pleaded is a nullity. *Henry* v. *Hoover*, 417.
4. In an action of assumpsit the defendant plead a special plea of set-off, which was the only plea pleaded; the plaintiff took issue upon it, and a verdict was rendered thereon, and judgment given accordingly: *Held*, that the mispleading was cured by the verdict, and that the verdict and judgment should not be disturbed. *Ib.*
5. A special plea of set-off in an action of assumpsit, may properly be treated as a nullity. Yet if it be demurred to, the demurrer must be disposed of, or it will be error. *Anderson* v. *Burke*, 475.
6. Where a plea of set-off to an action of assumpsit is filed and demurred to, however technically correctly it may be pleaded, the plea being such as from its intrinsic nature a judgment according to law cannot be given sustaining it, the demurrer must be sustained. *Ib.*
7. A. being sued by B. in assumpsit for wages due B. as overseer for A., plead a special plea of set-off, in effect that B. was indebted to A. in the sum of one thousand dollars, and had promised to pay it in consideration of the death of A's. slave, caused by B. To this plea B. demurred: *Held*, that the demurrer was properly sustained. *Ib.*

ATTACHMENT.

1. Upon motion to dismiss an attachment, the court cannot look beyond the face of the bond itself; if it be valid upon its face, that is sufficient.

Spear v. *King*, 276.

Digitized by Google

2. If an attachment bond be signed by A. as agent for the attaching creditor, and be in other respects regular, the court cannot, on motion to dismiss the attachment, inquire into the question as to the agency of A. *Ib.*
3. An affidavit to procure an attachment, which avers that the debtor is concealing his goods, will not be vitiated by containing the reason of the creditor's belief of that fact. *Ib.*
4. An affidavit to procure an attachment in these words, viz. — "Said K. (the debtor) has conveyed to his brother most of his tangible effects, is greatly in debt for goods purchased as a merchant, and these debts are pressing him; that these goods K. had conveyed to his brother, who was a man of little property or responsibility; but lately come to this state; no permanent residence in it, and is expected soon to leave; that some of said goods had been boxed up, and that K. and his brother contemplated moving themselves out of this state in some short time, and that by this means K. was concealing his effects so that the claim of the creditor would be defeated in the ordinary course of law." *Held* to be sufficient. *Ib.*
5. An affidavit to procure an attachment, stating that the defendants are concealing their effects so that the ordinary process of the law cannot be served on them, and that the claim against them will be defeated, &c., is sufficient. *Lovelady* v. *Harkins*, 412.
6. If the process in attachment, by mistake of the justice, recited that the *plaintiffs* were concealing their effects, &c., instead of the defendants, and the bond and affidavit contained correct recitals, the court will look to the whole record and not construe it so as to defeat its own end. *Ib.*

ATTORNEY AT LAW.

1. Where an attorney at law was sued for damages occasioned by his failure to sue one of the parties to a note placed in his hands for collection, it will be a good plea in bar of the action that he, as attorney at law, sued one of the makers of the note in due course of law, and recovered a judgment against him which bound a sufficient amount of unincumbered property to pay the debt, and that satisfaction would have been obtained of the judgment, but that the plaintiff by his own act surrendered up and vacated it.
Ransom v. *Cothran*, 167.
2. If a claim be placed in the hands of two attorneys practising in partnership, and before any steps are taken in the collection of the claim, the firm dissolve, and one of the members take charge of the claim, and render all the services in its collection, and sue individually the owner of the claim for his fees for so doing, the jury will be justified in inferring that it was part of the contract of dissolution between the partners, that the one who has rendered the services should attend to the claim and receive the compensation, and their verdict to that effect will be upheld.
Anderson v. *Tarpley*, 507.

Digitized by Google

AWARD.

1. Whether an award upon the voluntary submission to arbitration by the parties, made by the arbitrators without notice to the parties, is void? *Quære? Upshur* v. *Hargrove*, 286.
2. Where a bill in chancery sets up an award of arbitrators, and traces the claim of the complainant through it, the award will be held *prima facia* good, on *pro confesso*, even though the bill does not aver that the award was made upon notice. *Ib.*
3. J. having a claim against the state, the legislature passed a law by which the Governor, the auditor, and commissioner of public buildings were authorized to examine J's. accounts, and to make him such allowance as they might find him entitled to: *Held*, that if J. assented to the law by having his accounts examined under it, and they decided against him, he was precluded from making further claim. *Jack* v. *The State*, 494.

BAIL.

1. Where the assignee of one of a series of notes, all secured by mortgage, sues the debtor at law and arrests him upon *mesne* process, and afterward, from the inability of the debtor to give bail, and out of clemency discharge him from the arrest, the mortgage lien of such assigned note will not thereby be divested or taken away. *Terry* v. *Woods*, 139.
2. It seems it would be otherwise if the discharge were upon an arrest on final process. *Ib.*

BANK NOTES.

1. Executions in favor of the various officers of the circuit court of Tippah county, amounting to about $130; having been issued for costs against the Mississippi Union Bank, and having come to the hands of the sheriff of that county, were levied on real estate of the bank; the sheriff sold the same for the sum of one thousand dollars to D., who offered the sheriff the amount due the officers of court in specie, and tendered him the residue of his bid in notes of the bank, and demanded a deed to the property. *He d* that the sheriff had a right to demand gold and silver for the whole amount of the bid, and that D. was therefore not entitled to a deed from him. *Davis* v. *Pryor*, 114.
2. L. being sued on a bond due in May, 1840, which was payable in the notes of a particular bank, plead that on the 18th day of November, 1840, he tendered the amount in bills of the bank to the plaintiff, and that he brought the sum due, with interest, in the notes of the bank into court ready to be paid to the plaintiff. *Held*, on demurrer that the plea was bad. *Lanier* v. *Trigg*, 641.
3. In an action on a bond payable in the notes of a particular bank, the

Digitized by Google

measure of damages is the value of the notes at the time of the maturity of the bond, not its value at any subsequent period. *Ib.*

4. J. and R. being assignees of a note payable to B., sued the makers thereon at law; the defendant plead payment and a special plea of tender; the substance of which was that though the note was payable to B. on its face, yet it was in reality the property of the Hernando Bank when made, and was by agreement to be paid in the notes of the bank, which notes, for the sum due they had tendered, six months after the maturity of the note, to the assignees. A demurrer to the plea of tender having been sustained and a trial had upon the plea of payment, and a verdict and judgment rendered for the amount of the note, in favor of the assignees; the defendants on writ of error to this court, insist upon their right to pay the judgment in the notes of the bank by which the note was alleged to have been assigned. *Held*, that the defendants below having permitted the suit there to be conducted by the plaintiffs as assignees of B., without question of their character in that particular by proper plea, had admitted their right to sustain their suit in that character, and it could not now be questioned. *Ib.*

BANKS.

1. Where in an action by a bank against the parties to a note held by it, it appeared in proof that the cashier of the bank had made an agreement which, if carried out, would have discharged all the parties to the note, but one; and that he had made that agreement after consulting with two or more of the directors, and the court instructed the jury that the cashier of the bank had no authority to bind the bank by any contract that would release parties, but that if he acted on consultation with two or more of the directors, then his acts would be binding on the bank: *Held*, that the entire instruction taken together and applied to the facts, was not erroneous in its conclusion. *Payne* v. *Commercial Bank of Natchez*, 24.

2. To an action brought by a bank on a note, payable to it by its corporate name, pleas denying the corporate existence of the bank at the time of the execution of the note, and setting up violations of its charter, and asserting a failure of the bank to comply with certain prerequisites of its corporate existence, however defective they may be in form, cannot be stricken out on motion, they must be reached by demurrer. *Smith* v. *The Commercial Bank of Rodney*, 83.

3. In an action of assumpsit by a bank upon a promissory note, payable to itself, it is not competent for the court, at the instance of the defendant, to inquire into the organization of the bank or as to fraud in the taking of its stock. *Smith* v. *Mississippi and Alabama Railroad Company*, 179.

4. Where in a proceeding by information in the nature of a *quo warranto* against a bank, the court was asked to charge the jury that if they believed, from the evidence, that the cashier or teller or clerks of the bank,

Digitized by Google

as officers and agents of the bank, received either directly or indirectly from any one the notes of non specie-paying banks, in payment for any part of the capital stock of the bank, they must find for the plaintiff; it was *held*, that the charge was too broad; that to make a payment binding on a corporation, it should be made to some agent authorized to receive it; and that the charge, as asked, was properly rejected.

The State v. *The Commercial Bank of Manchester*, 218.

5. The acts of a cashier of a bank are only binding upon the bank when he acts within the sphere of the agency prescribed to him; if there be no express regulation or restriction, all acts which appertain to his office, will effect the bank; if he be restricted or limited in the scope of his agency by the bank, the act of the cashier in violation of the restriction or beyond the limit, will not be the act of the bank. *Ib.*

6. In a proceeding against a bank by information in the nature of a *quo warranto*, the acts of the cashier, when proved, will be *prima facie* binding on the bank when performed in the discharge of the ordinary duties which belong to that officer, and in order to avoid such acts of the cashier, it devolves upon the corporation to shew a special restriction imposed upon the cashier by the directors. *Ib.*

7. A directory of a bank may, through its cashier, violate the charter of the bank; if, however, they can show that in the particular act of the cashier alleged to be a violation of the charter, he departed from his duties as prescribed by them, such will not cause a forfeiture of the charter. *Ib.*

8. Where in an information in the nature of a *quo warranto* against a bank, the court was asked to charge the jury that "if they believed from the evidence that it was agreed between the cashier of the bank and M., a holder of part of the capital stock of the bank, that he should, to make payment of his stock and evade the charter of the bank, procure the notes of the bank which was then a non specie-paying bank; that the cashier should receive the notes, count out their amount in specie and immediately take or receive back said specie, without M. being at liberty to take the same away from the bank, and that he should thereupon receive a certificate of stock, and that said M. did so pay an instalment on his stock and receive a certificate, they must find for the plaintiff; there being proof that the board of directory had given positive directions that nothing but gold or silver, or the notes of specie-paying banks should be received in payment of stock; it was *held*, that the charge as asked was properly refused, not having reference to the testimony before the jury. *Ib.*

9. If a plea of *nul tiel corporation*, supported by affidavit, be filed to a declaration by a bank on a note, and issue be joined thereon, and the bank introduce in evidence, a copy of the act of its incorporation, with proof of user under the charter, it is sufficient to entitle it to recover.

Henderson v. *Mississippi Union Bank*, 314.

Digitized by Google

10. In an action against the maker of a note, payable to a bank by the indorsee of the bank, since the statute of 1840, prohibiting assignments by banks, if the maker of the note desire to avail himself of that statute in his defence, he must do so by plea in *abatement;* he cannot do so under the general issue. *Hazlip* v. *Leggett*, 326.

11. The Commercial Bank of Manchester lent to C. & M. $12,000, for which they were to ship cotton to the merchants of the bank, to be shipped to Liverpool and sold for account of C. & M.; and the proceeds to be credited on the note of C. & M. for the sum lent; C. & M. shipped 200 bales of cotton which were sent to Liverpool and for which the bank credited C. & M.'s note with $6,711 39 as the proceeds of sale; C. & M. not being satisfied with the credit thus given, it was *held*, that they had a right to show by way of increasing the amount of offset, the quality of the crop of cotton of that year, the usual weight of the bales, and the average price at Liverpool about the time the sale took place.
The Commercial Bank of Manchester v. *Chisholm*, 457.

12. Nor in such case would the defendant be authorized to show that the notes of the bank, at and near the time of the maturity of the note, were at a discount in New Orleans, by way of increasing the amount of set-off; if any such inquiry be instituted into the value of the money loaned, it must be confined to the time of the loan, and the place where it occurred. *Ib.*

13. If the notes were at par value when received by C. & M., and the bank be by the contract liable for the difference of exchange, the measure of her liability, would be the premium between par and exchange on Liverpool at the time of the sale of the cotton. *Ib.*

14. If the notes were below par when paid out by the bank, then the amount of discount on them must be added to that premium, so as to make them equivalent to par funds, at the time they were paid out. *Ib.*

15. By making a note payable at a particular bank, the parties are presumed to consent to be governed by such customs as may prevail in the bank with regard to making demand of payment. *Harrison* v. *Crowder*, 464.

16. A greater strictness must be observed in making demand of payment at a bank having banking hours, than is necessary in personal demands. A personal demand may be made at any time during the third day of grace; but a constructive demand at a bank with business hours, must be made at the close of the business hours; for the maker has until that time to deposit the money for the payment of the note. *Ib.*

17. In an action against the indorser of a promissory note payable at a bank with banking hours, the notary testified that he had no recollection of the fact or time of presentment, except from his protest, from which he had no doubt that he did present the note; that when he protested the note sued on, his habit was to make demand of payment about the close of banking hours, believing that practice to conform to the law; when payment was refused,

Digitized by Google

he took the note away with him; he could not say whether the note sued on had been presented an hour or a minute before the close of the bank, except from his habit of presentation: *Held*, that the testimony should have been left to the jury for them to say whether the demand on the note had been made about the close of banking hours. *Ib.*

18. There is no rule of law which compels the holder of a note to deposit it in the bank at which it is made payable; if it be presented there at the close of business hours it must be sufficient.

19. The law does not prescribe impracticable rules; it seems, therefore, that when a note is payable at a bank having business hours, it is not absolutely essential that the note should be presented at the very moment of closing the doors of the bank, probably a few minutes would be regarded as of little consequence in the application of the rule. *Ib.*

20. Where in an action against the indorser of a note payable at a bank with business hours, the judge instructed the jury that a demand of payment "in some reasonable or convenient time before the doors were closed," would be sufficient; it was *held*, that the instruction was erroneous. *Ib.*

21. The provisions of the act of the legislature of 1843, (sessions act 55), entitled "An Act prescribing the mode of proceeding against incorporated banks for a violation of their franchises, &c." which provide that when a judgment of forfeiture is entered against a bank in proceedings under that act, its debtors shall not thereby be released from their debts and liabilities, but that the court rendering such judgment shall appoint one or more trustees to take charge of the books and assets of the bank, to sue for and collect all debts due to it, to sell all its property and apply the same as might be thereafter directed by law to the payment of its debts, do not impair the obligation of the contracts of the debtors of the bank, and are in all respects constitutional. *Nevitt* v. *Bank of Port Gibson*, 513.

22. Where a bank has forfeited its charter, it is a legitimate and proper exercise of legislative power to provide by law for the preservation of the property of the bank for the benefit of its creditors, by remitting the penalties which attach to a judicial judgment of forfeiture of its charter. *Ib.*

23. The sixth section of the act of 1843 prescribing the mode of procedure against banks which have forfeited their charters, which authorizes the issuance of an injunction against the bank, to restrain it from the collection of its debts, is constitutional only when taken in connection, and regarded as part of the same law with the 9th, 10th, and 11th sections of the act, and which provide for the collection and preservation of the debts and assets of the bank for the benefit of creditors. *Ib.*

24. When a judgment of forfeiture has been rendered against a bank in proceedings under the act of 1843, and trustees have been appointed by the court rendering the judgment, all suits pending in the name of the bank, whether at law or in equity, may be revived at the instance, and in the name of the trustees; and the action will progress in the name of the trus-

Digitized by Google

tees, in the same manner and to the same effect that a suit is revived in the name of an executor or administrator, which was pending in the lifetime of the testator or intestate. *Ib.*

25. The act of 1843, in its 9th, 10th, and 11th sections, directing the trustees to proceed to collect the debts and property of the bank for the benefit of creditors, to be applied as thereafter directed by law, constitutes the property of the bank a trust fund for the benefit of creditors, which no subsequent legislation can appropriate otherwise; and if the legislature fail to direct the mode of distribution among the creditors, a court of chancery will execute the trust. *Ib.*

26. A judgment of forfeiture against a bank, and appointment of trustees under the act of 1843, is an assignment by operation of law, of all the property of the bank to the trustees for the benefit of creditors; which relates back to the period of the issuance of the injunction against the bank under the act, and preserves the assets and property of the bank from that time, for the benefit of the creditors. *Ib.*

27. A judgment of forfeiture against a bank under the act of 1843, has none of the common law consequences of a judgment of forfeiture; the legislature having waived its right to the common law penalties, by providing that concurrently with the judgment of forfeiture, the assets and property of the bank shall vest in trustees for the benefit of creditors of the bank. *Ib.*

28. The mere judgment of forfeiture does not *ipso facto*, work a dissolution of the corporation; there must be first execution for the seizure of the franchises before the penalties of forfeiture take place. *Ib.*

29. In a proceeding against a corporation as such, for forfeiture of charter, the performance of conditions precedent to the existence of the corporation cannot be inquired into; its existence as a corporation is admitted by the proceedings against it. *Commercial Bank of Natchez* v. *The State*, 599.

30. The charter of the Commercial Bank of Natchez provided that no person, firm or corporation, should in the original subscription for stock, on any one day, subscribe directly or indirectly, or procure any other person to subscribe with the understanding that it should be transferred after the books were closed, for more than fifty shares of stock; in a proceeding by *quo warranto* against the bank, it was alleged as ground of forfeiture, that more than fifty shares had been subscribed for, in violation of that section of the charter, and that the stock had been afterwards transferred: *Held*, that these subscriptions for stock being under the superintendence of eight commissioners named in the charter, and under their supervision, and before the bank had a corporate existence, the bank, as such, would not be held responsible for the violation of law of those commissioners who were the agents of the state. *Ib.*

31. *Bona fide* subscriptions to stock in a bank cannot be affected by irregularities which occurred in the subscriptions for stock preliminary to the organization of the bank, made under the supervision of agents of the state, appointed for the purpose of organizing the bank. *Ib.*

Digitized by Google

32. It was provided in the charter of a bank, that "should any stockholder refuse or fail to pay any instalment on his stock when called for, the company shall sell said stock, on giving thirty days notice in some gazette, on account of, and at the risk of the stockholder:" *Held*, that failure on the part of the bank to comply with this provision, was not a cause of forfeiture of the charter of the bank; the authority to sell the stock was a mere cumulative remedy given to the corporation to enable it to coerce the payment of stock in a more speedy manner than by action at law. *Ib.*

33. A refusal by a bank on proper application, to pay its notes, bills, bonds and other liabilities issued by the bank, in specie, is a cause of forfeiture of the charter of such bank. *Ib.*

34. The charter of a bank contained no provision which in so many words required the bank at all times to pay specie; by its charter the capital stock was to be paid in gold or silver, or the notes of specie-paying banks; the bank was prohibited from issuing notes to a greater amount than three times the amount of the capital stock paid in; by another section of the charter it was provided that if the bank refused to pay its notes on demand, the holder might demand an interest of twelve and a half per cent. per annum on such notes, the payment of which had been refused. In a proceeding by *quo warranto* against the bank, it was alleged, as cause of forfeiture, that the bank on the first day of November 1841, and on divers other days before and since, did refuse, on demand being made at its counter in its banking house during the regular hours for doing business, to redeem in specie or other lawful money of the United States, the notes, bills, bonds, and other liabilities issued by said bank, and then due: *Held*, on demurrer that the cause of forfeiture was sufficiently pleaded, and the demurrer must be overruled. *Ib.*

35. In a proceeding against a bank for forfeiture of charter, alleging as cause of forfeiture, a suspension of specie payments, the answer of the bank that it paid all its notes and liabilities except certain checks which it had drawn on another bank, for payment of which provision had been made with that bank, but it failed to pay them, and they were returned; and on being returned, the bank which issued them was unable to take them up at the time, but in two years afterwards, and before the commencement of any proceedings against it, it resumed specie payment on those checks and all other liabilities, whenever payment was demanded at its counter, and was then paying specie, was *held* not to be a sufficient answer to the charge of forfeiture and no excuse for the suspension. *Ib.*

36. How far a mere temporary suspension of specie payments will work a forfeiture of charter, and what is a *temporary* suspension? *Quære? Ib.*

37. In the year 1840, a bank chartered previously, being in a state of suspension of specie payments, the legislature passed a law that all the banks in the state by the first of April, 1840, should pay their fives in specie; by the first of July their tens; by the first of October their twentys, and by

Digitized by Google

the first of January, 1841, their other notes and debts: *Held*, that this act was constitutional and valid; and a failure on the part of the bank to comply with the provisions of the law would work a forfeiture of its charter. *Ib.*

38. An act of incorporation is a contract within the meaning of the constitution of the United States, and any legislative act which impairs it by enlarging the power of the state, over the body corporate, or by abridging its franchises, or which alters it in any material point, is void. *Ib.*

39. In 1843, the legislature passed a general law prescribing the mode of proceeding against banks that had violated their corporate franchises, (acts of 1843, 52—57.) In the same year proceedings in the circuit court were commenced under that act against the Planters Bank. In 1844, the legislature passed another act in relation specially to the Planters Bank, and one other bank, authorizing them upon certain conditions to surrender their charters; and upon their refusal to do so, making it the duty of the attorney-general, and requiring him to proceed by bill in the superior court of chancery against them, have a receiver appointed to take charge of their property, and proceed to have them wound up; the law of 1844 provided that if either of the companies should accept and comply with the conditions of the act by a voluntary surrender of its charter; then such bank should be released from the operations of the said law of 1843; the Planters Bank did not accept the conditions of the act of 1844, and the proceedings already instituted in 1843, under the laws of that year, having progressed to judgment in the circuit court against the bank, that court declaring its charter forforfeited and appointing trustees under the law of 1843 to collect its debts and take charge of its property, the bank appealed to this court and the cause was here submitted on a preliminary motion as to whether the law of 1844 had not repealed the act of 1843, and taken away the jurisdiction of the circuit court: *Held*, that there was no necessary repugnancy between the two acts, and therefore the latter did not by implication repeal the former; that no proceedings being instituted in the chancery court under the latter act, the circuit court did right to proceed to judgment under the law of 1843. *The Planters Bank* v. *The State*, 628.

40. Where a note is payable or belongs to a bank and has been assigned by such bank since the act of 1840; prohibiting assignments by banks of their notes and other evidences of debt, in an action upon such assigned note, the only mode of the defendant's availing himself of the defence is by plea in abatement. *Lanier* v. *Trigg*, 641.

41. T. & R., being assignees of a note payable to B., sued the makers thereon at law; the defendant plead payment and a special plea of tender; the substance of which was, that though the note was papable to B. on its face, yet it was in reality the property of the Hernando Bank when made, and was, by agreement, to be paid in the notes of the bank, which notes, for the sum due they had tendered, six months after the maturity of the

Digitized by Google

note, to the assignees. A demurrer to the plea of tender having been sustained and a trial had upon the plea of payment, and verdict and judgment rendered for the amount of the note in favor of the assignees; the defendants, on writ of error to this court, insist upon their right to pay the judgment in the notes of the bank, by which the note was alleged to have been assigned: *Held*, that the defendants below, having permitted the suit there to be conducted by the plaintiffs as assignees of B. without question of their character in that particular by proper plea, had admitted their right to sustain their suit in that character and it could not now be questioned. *Ib.*

42. P. entered into a contract with the Jackson and Brandon Railroad and Bridge Company, by which he agreed to build a bridge over Pearl River, and to construct a turnpike road from the eastern end of the bridge to the termination of the swamp in an eastwardly direction; and the company agreed to pay him $37,500 for the bridge over the river, forty-four cents per cubic yard for making the embankment for the turnpike, and ten dollars per lineal foot for building all necessary bridges between the bridge over the river and the end of the turnpike at the termination of the swamp. Sometime thereafter, P. entered into a contract with the Mississippi and Alabama Railroad Company, to which the Bridge Company were also parties, by which he agreed to construct a railroad, furnish materials, &c., from Jackson to Brandon, and the Railroad Company agreed to pay him therefor $204,000, and an extra sum for excavating rock. In the last contract, there was a clause declaring that the Bridge Company had abandoned their scheme, and that they thereby assigned to the Railroad Company all their rights and privileges under their first contract with P.; but in the last contract it was expressly stipulated, that the building of the bridge over Pearl River should not be included in P.'s obligations to the Railroad Company. *Held*, that the two contracts must be construed together, and that P. was entitled to receive from the Railroad Company the $37,500, forty-four cents per cubic yard for making the embankment, and ten dollars per lineal foot for building bridges, in addition to the $204,000, and the extra sum for excavating rock. *Petrie* v. *Wright*, 647.

43. Corporations may contract under their corporate seal, by a vote of the directory entered on the books of the corporation, or by their agents acting within the scope of their authority, and binding contracts may be implied from their corporate acts without either a vote, deed, or writing. *Ib.*

BILL OF EXCEPTIONS.

1. In an action upon a judgment rendered in another state, if the bill of exceptions taken to the admission of the record in evidence, does not embody the record itself, this court will not notice it even though a record answering the description of the one sued on, is inserted by the clerk in the transcript for this court. *Wright* v. *Bank of Alabama*, 251.

Digitized by Google

2. Where a bill of exceptions is taken in the admission of a deposition, on the ground that it was a deposition not taken in the pending suit, but in another suit between the same parties and the deposition, is not inserted in the bill of exceptions, the court will not disturb the verdict. *Ib.*

3. Where a bill of exceptions is taken to the refusal of the court to grant a new trial, but does not embody the evidence or set forth anything upon which the court can act, the judgment of the court below will be affirmed. *Ib.*

4. Where the bill of exceptions taken by the plaintiff to an order of the court setting aside the service of the writ, after pleas were filed, and rendering a final judgment for the defendant, recites that the order thus excepted to was made on the motion of the plaintiff, while the judgment of the court itself states that it was made on the motion of the defendant; the high court of errors and appeals will adopt the construction that the order was made on the motion of the defendant, as the most sensible and consistent with the whole record. *Wooten* v. *Wingate*, 271.

5. Where the record showed that, at the December term, 1842, of the circuit court, a motion was made to quash a forthcoming bond, which was taken under advisement, and not decided in four months, as required by the statute; and afterwards, at the December term, 1843, a like motion was made to quash the forthcoming bond, which was sustained, and the bond quashed; *held*, although no forthcoming bond was embodied in the record by bill of exceptions, yet it sufficiently appeared that the motion to quash, which had been sustained, was not made at the return term of the forthcoming bond, and was therefore erroneously sustained.
Puckett v. *Graves*, 384.

BILL OF EXCHANGE AND PROMISSORY NOTES.

1. The plea to an action of assumpsit on a promissory note that the plaintiff was not the lawful owner or bearer of the note sued upon at the time of the commencement of the suit, is bad as amounting to the general issue.
Bingham v. *Sessions*, 13.

2. A plea to an action on a note, that the note was obtained by duress, setting forth in a detail of circumstances the nature of the duress in the procurement of the note, is not by such detail even if unnecessary, vitiated. *Ib.*

3. A plea to an action on a note, that the note was given to obtain the release of certain property levied on by virtue of a certain execution, which was fraudulently issued on a judgment previously satisfied, under which execution the plaintiff threatened to sell the property thus levied on; *held*, to be bad on demurrer. *Ib.*

4. A note given to obtain the release of property from an illegal levy, is not void; the maker has his redress by action against the judgment creditor, or the option to give the note; if he elect the latter, he is bound by it. *Ib.*

5. A plea to an action on a note that the note was obtained by duress, through

Digitized by Google

the fraudulent levy of an execution by the plaintiff therein ; though bad as a plea of duress, should be so amended by the permission of the court, as to allow the defence arising out of the fraud of the plaintiff to be made. *Ib.*

6. He who signs a bill or note in blank and delivers it to another, makes that person his agent, and authorizes him to fill it up with an indefinite amount. *Hemphill* v. *Bank of Alabama*, 44.

7. But if such agent be limited in his authority, and fill up the note with an amount exceeding his limit, the note will, in the hands of a person who has received it with a knowledge that the authority was limited, be void as to the excess. *Ib.*

8. A defendant cannot, under the plea of *non assumpsit* merely, avail himself of the defence that the note on which he has sued, has been changed from the note, the execution of which he authorized ; such defence is admissible only when the pleadings are under oath. *Ib.*

9. Whether an action can be maintained in the courts of Mississippi, by the bearer of a note payable to bearer; which note was made in the state of Alabama, where a statute provides that no one can maintain an action as the bearer of a promissory note? *Quære? Ib.*

10. The insolvency of the maker of a promissory note is no excuse for not making demand of payment, and not giving notice of protest. *Reaves* v. *Dennis*, 89.

11. Where the declaration against the indorser of a promissory note in its first count was in the usual form, but in the second did not aver demand and notice to the indorser, but, as excuse for the omission, averred that the maker of the note was insolvent; and the defendant plead non assumpsit, and a verdict, without any charge from the court, on proof of the insolvency, was rendered for the plaintiff; and the defendant moved for a new trial, which being refused he embodied the testimony in a bill of exceptions, and brought the case to this court: *Held*, that the statute of jeofails did not preclude this court from examining the case, and granting a new trial for want of sufficient evidence to uphold the verdict. *Ib.*

12. Where the payee of a joint note, the makers of which reside in different counties, sues them all in a joint action in a county where one of them lives, and by writs to the different counties brings them all before the court of the county where the suit is instituted; and the maker residing in that county pleads to the action while the others make default, the holder of the note may discontinue his suit as to that maker, and may take judgment by default final against the others. *Read* v. *Renaud*, 79.

13. The assignment of a note secured by mortgage, carries the benefit of the mortgage along with it to the assignee. *Terry* v. *Woods*, 139.

14. Where the assignee of one of a series of notes all secured by mortgage, sues the debtor at law and arrests him upon *mesne* process, and afterward, from the inability of the debtor to give bail, and out of clemency discharge him from the arrest, the mortgage lien of such assigned note will not thereby be divested or taken away. *Ib.*

Digitized by Google

15. It seems it would be otherwise if the discharge were upon an arrest or final process. *Ib.*

16. Where the holder of one of a series of mortgaged notes, indorsed the note to a third person before due, and after its maturity and non-payment takes it up and becomes again the holder thereof, he will not thereby lose his recourse upon the mortgaged premises, but will be substituted again to his original rights. *Ib.*

17. L. sued S. & H. and P. & M. upon a joint note; M. died during the progress of the suit and before judgment; whereupon L. having brought the administrators of M. before the court by *sci. fa.* dismissed the suit as against the other parties, and took judgment against the administrators of M. *Held*, that the proceedings were regular and proper. *Woodhouse* v. *Lee*, 161.

18. A plaintiff in an action upon a joint note, may discontinue the suit as to any one or more of the defendants, and proceed to judgment against the others. *Ib.*

19. In an action against the indorser of a note, the notary's deposition was read by the plaintiff to prove the protest and notice; and the defendant read another deposition taken a year previous, of the same notary, about the same note, in which deposition he differed in his statements from those in the other, about the mode of giving notice; when the plaintiff proved, that when the first deposition was given, the notary's books were lost, and the notary testified from recollection; when the second was taken they were found, and the notary had refreshed his memory from them. The defendant, by way of rebutting this proof, then offered to prove the notary's general habit in keeping his notarial record, and that he was in the habit of leaving his memoranda of notices of protest partly in blank, to be filled up afterwards. The court below rejected the testimony thus offered in rebuttal: *held*, that it was competent, and should have been received.
Seltzer v. *Fuller*, 185.

20. B. and J. B., being sued by H. upon their joint note, offered to prove that the note was given in satisfaction of a decree of the probate court against B., as administrator of P., who in his lifetime was administrator of N. P.; in favor of H., as administrator *de bonis non* of N. P.; which evidence the court refused to admit: *Held*, that the evidence was admissible; and if the note were executed in settlement of that decree, B. and J. B. were not liable on it, unless B. had assets sufficient for its payment.
Byrd v. *Holloway*, 199.

21. Although as a general rule, one partner cannot sue his copartners at law for a sum of money due on account of the partnership, unless it be the balance of a separate account or a general balance of accounts; yet where several partners execute a note payable to one partner, even though on account of matters connected with the partnership, it is an acknowledgment of a separation of the sum from the partnership account, and the payee may maintain an action at law on the note. *Bonnaffe* v. *Fenner*, 212.

Digitized by Google

22. In an action of assumpsit brought by B. as the bearer of a note made payable to M. or bearer, for the use of the Real Estate Banking Company of Hinds County, by F. and others; on proof that the makers of the note and the payee were all members of the company for whose use the note was made, *held* that B. might, notwithstanding, maintain his action on the note. *Ib.*

23. In an action of assumpsit by the bearer of a note made payable to "M. or bearer, for the use of the Real Estate Banking Company," it will not be necessary to set out the words stating for whose use the note was made, as they constitute no part of the legal contract. *Ib.*

24. If the holder of a promissory note be ignorant of the place where the indorser resides at the time of protest, and cannot ascertain it after diligent inquiry, notice of protest sent to the place where the note bears date will be sufficient. *Godley* v. *Goodloe*, 255.

25. The question of due diligence in serving notice of protest, when it depends on the testimony of witnesses before a jury, must be submitted to the jury for their decision under appropriate charges as to the law from the court; if the evidence be agreed on by the parties, the question of due diligence is then one purely of law for the decision of the court. *Ib.*

26. It is competent for the maker of a note given for lands bought at an administrator's sale, to show by the record of the proceedings of the probate court appertaining to the sale, that the sale was not made according to the directions of the statute, and thus establish a failure of consideration of the note. *Laughman* v. *Thompson*, 259.

27. The administrators of a deceased person, at the sale of his personal property, proclaimed that the slaves about to be sold were subject to judgment liens, and offered and agreed that in case they should be seized under the judgments, the sale should be considered as void, and the notes of the purchasers be given up; the slaves accordingly sold for their full value; in an action brought by the administrators on a note given for the purchase-money, *held*, that the makers of the note might show, under the general issue, that the slaves, for the price of which the note was given, were taken out of their possession and sold by judgments against the estate, and that the consideration of the note had thus failed. *Buckles* v. *Cunningham*, 358.

28. If a third party take up a bill for the honor of the drawer, and at his request, at its maturity, he thereby releases the accommodation acceptor of such bill, whether he intended it or not. *McDowell* v. *Cook*, 420.

29. In an action by M. against C., the acceptor of a bill drawn by B. in favor of R., and by R. indorsed to M., the court instructed the jury, that if they believed, from the evidence, that the plaintiff took up the bill at its maturity at the request of B., the drawer, and for his benefit, it was a payment of the bill, and they must find for the defendant, and that whether M. and B. intended to release C. or not: *Held*, there being proof that C. was an accommodation acceptor of B., that the charge was correct. *Ib.*

Digitized by Google

30. In an action against the indorser of a bill of exchange, it was proved that the holder of the bill, after its maturity, received ten per cent. of its amount from the acceptor, and in consideration thereof agreed to wait until the drawer of the bill could be heard from, though the witness who testified to the agreement did not recollect that any definite time of payment of the balance due on the bill had been agreed on: *Held*, that the indulgence granted to the acceptor until the drawer could be heard from, based upon a sufficient consideration, exonerated the indorser. *Rupert* v. *Grant*, 433.

31. By making a note payable at a particular bank, the parties are presumed to consent to be governed by such customs as may prevail in the bank, with regard to making demand of payment. *Harrison* v. *Crowder*, 464.

32. A greater strictness must be observed in making demand of payment at a bank having banking hours, than is necessary in personal demands. A personal demand may be made at any time during the third day of grace; but a constructive demand at a bank with business hours, must be made at the close of the business hours, for the maker has until that time to deposit the money for the payment of the note. *Ib.*

33. In an action against the indorser of a promissory note payable at a bank with banking hours, the notary testified that he had no recollection of the fact or time of presentment, except from his protest, from which he had no doubt that he did present the note; that when he protested the note sued on, his habit was to make demand of payment *about* the close of banking hours, believing that practice to conform to the law; when payment was refused he took the note away with him; he could not say whether the note sued on had been presented an hour or a minute before the close of the bank, except from his habit of presentation: *Held*, that the testimony should have been left to the jury, for them to say whether the demand on the note had been made about the close of banking hours. *Ib.*

34. There is no rule of law which compels the holder of a note to deposit it in the bank at which it is made payable; if it be presented there at the close of business hours, it must be sufficient. *Ib.*

35. The law does not prescribe impracticable rules; it seems, therefore, that when a note is payable at a bank having business hours, it is not absolutely essential that the note should be presented at the very moment of closing the doors of the bank; probably a few minutes would be regarded as of little consequence in the application of the rule. *Ib.*

36. Where in an action against the indorser of a note, payable at a bank with business hours, the judge instructed the jury that a demand of payment "in some reasonable or convenient time before the doors were closed," would be sufficient; it was *held* that the instruction was erroneous. *Ib.*

37. In an action of trover for a note payable to bearer, the possession by the defendant of the note will be *prima facie* evidence of his ownership, which will not be rebutted by proof that the note formerly belonged to the plaintiff. *Smith* v. *Prestidge*, 478.

Digitized by Google

38. It seems it would be otherwise if the note were payable to order, and not indorsed. *Ib.*

39. Where a holder sues on a note and his title is properly questioned, he must make out his title; but when the holder is sued for a note payable to bearer, his possession will be a sufficient protection, until a better title is shown. *Ib.*

BONDS.

1. The sureties on a tax collector's bond are not liable to the publishers of a newspaper, for the payment of the costs of advertising the sales of property by the tax collector for taxes in such paper; notwithstanding the law makes it his duty to advertise his sales in a newspaper. *Brown* v. *Phipps*, 51.

2. Tax collector's bonds, the conditions of which are to collect and pay into the county and state treasury all the state and county taxes, and to do and perform all the other duties which pertain to their office, are not securities for any services rendered to the state by individuals; but for the state and county only. *Ib.*

3. Where a declaration against an attorney at law for neglect in suing upon a claim placed in his hands for collection, contains several counts, in some of which the claim is described as a promissory note, in others, as a writing obligatory, and the defendant's plea to the whole action in other respects formal, and containing a good bar to the action, will not be defective for describing the claim as a writing obligatory. *Ransom* v. *Cothran*, 167.

4. Where a bond was payable on its face to B., it seems it is a matter of doubt whether it would be admissible in a court of law to prove that the obligation did not originally belong to B., but to a bank.

Lanier v. *Trigg*, 641.

BOND FOR TITLE.

1. Where a vendee who has taken from his vendor a bond for title when the purchase-money is paid, has, on the payment of all the purchase-money, such an interest in the premises purchased, as is liable to seizure and sale under execution of *fieri facias* at law. *Moody* v. *Farr*, 100.

2. Where a purchaser under execution at law of real estate to which the judgment debtor had but a bond for title, files his bill against the vendor, averring that the whole purchase-money was paid by the judgment debtor before the sale under execution, and demanding title; and the vendor answer, denying the payment by the vendee, and averring the cancelment of the sale, and delivery up of the title bond, before the sale under execution: *Held*, that the purchaser at the sheriff's sale must prove satisfactorily that the whole purchase-money has been paid, or his bill will be dismissed. *Ib.*

3. Where a party executes his notes, payable at fixed periods, for the purchase of a tract of land, and receives from the vendor a bond to make title to the land; and the vendor sue on the notes to recover the purchase-

Digitized by Google

money, the contracts are independent, and the vendor may recover, although he has not made a deed to the land. *Hazlip* v. *Noland*, 294.

4. Where a vendor of land has given a bond for title, without affixing any time in which it is to be made, and takes notes, payable at a fixed time, for the purchase-money; and afterward, but before the notes are paid, executes a defective deed to the vendee, he will not thereby be deprived of his right to recover on the notes; as the execution of the defective deed does not absolve him from the obligation of his bond to make a good title, which the vendee may still demand. *Ib.*
5. Whether, where a vendee of land who has a bond for title from the vendor, dies before paying the purchase-money, and his administrators are sued therefor, the administrators can object to a deed from the vendor, made, but not delivered before the vendee's death, for insufficiency, or imperfection, so as to call in question the validity of the land, by way of assailing the validity of the notes; *Quære? Ib.*
6. Whether, where a vendor who has given a bond for title recites in his deed conferring title that he grants, bargains, and sells the land, and in the conclusion of the deed warrants the title only against himself and heirs, he thereby limits the statutory warranty, given to the words, grant, bargain, and sale. *Quære? Ib.*
7. A warranty does not pass title, but only secures an indemnity, if there be incumbrances. A vendor of land who has given a bond to make title, it seems, therefore, may, under some circumstances, comply with his bond by giving a deed to the land with special warranty. *Ib.*

CASHIER.

1. The acts of a cashier of a bank are only binding upon the bank when he acts within the sphere of the agency prescribed to him; if there be no express regulation or restriction, all acts which appertain to his office will affect the bank; if he be restricted or limited in the scope of his agency, by the bank, the act of the cashier, in violation of the restriction, or beyond the limit will not be the act of the bank.

The State v. *The Commercial Bank of Manchester*, 218.

2. In a proceeding against a bank by information, in the nature of a *quo warranto*, the acts of the cashier, when proved, will be *prima facie* binding on the bank, when performed in the discharge of the ordinary duties which belong to that officer. And, in order to avoid such acts of the cashier, it devolves upon the corporation to show a special restriction imposed upon the Cashier by the directors. *Ib.*
3. Where, in an information in the nature of a *quo warranto* against a bank, the court was asked to charge the jury, that "if they believed from the evidence that it was agreed between the cashier of the bank and M., a holder of part of the capital stock of the bank, that he should, to make payment of his stock, and evade the charter of the bank, procure the notes

Digitized by Google

of the bank, which was then a *non specie*-paying bank; that the cashier should receive the notes, count out their amount in specie, and immediately take or receive back said specie, without M. being at liberty to take the same away from the bank, and that he should thereupon receive a certificate of stock, and that said M. did so pay an instalment on his stock, and receive a certificate, they must find for the plaintiff;" there being proof that the board of directors had given positive directions that nothing but gold and silver, or the notes of specie-paying banks should be received in payment of stock; it was *held*, that the charge, as asked, was properly refused, not having reference to the testimony before the jury. *Ib.*

CERTIFICATE.

1. Whether the certificate of the record of a deed made by a deputy of the probate clerk, in his own name, and not in that of his principal, is a valid certificate, *Quære?* *Hundley* v. *Buckner*, 70.
2. Where a deed was offered in evidence, the certificate of the record of which was made and dated several years after the actual record of the deed, such certificate, unless there be evidence to disprove it, will be sufficient evidence of the proper record of the deed, to admit it as testimony. *Ib.*

CERTIORARI.

Where a slave has been prosecuted before a justice of the peace for larceny, under the statute (H. & H. 164, § 40,) and the justice has adjudged the costs of the prosecution against the owner of the slave, the circuit court has jurisdiction of a *certiorari*, at the instance of the owner, to determine whether, so far as the judgment for costs extended, the decision of the justice had been according to law and facts. *Atchison* v. *Potter*, 120.

CHANCERY.

1. In a suit in chancery against both adult and infant defendants, a decree rendered in favor of the complainants against all the defendants upon *pro confesso* against the adult defendants, and the answer of guardians *ad litem* for the infants, without any proof, will be erroneous as to the infants, even though time be reserved in the decree to the infants, after they come of age, to show cause against it. *Hargrove* v. *Martin*, 61.
2. Taking a case for confessed in equity, entitles the complainant to a decree only against the party as to whom the bill has been taken for confessed; not against the others; and if the defendant against whom no *pro confesso* is taken, disprove the bill, the whole will be dismissed. *Ib.*
3. A *pro confesso* against an infant will not authorize a decree against him; there must be proof; and a reservation of a right to show cause against the decree, after the infant attains majority, does not cure the error. *Ib.*
4. Whether the reservation of a right in an infant to show cause against the decree after he attains majority, extends only to defects or errors in the decree itself, and is barred by a sale under the decree — *Quære.* *Ib.*

Digitized by Google

5. Where a decree has been rendered in the chancery court in a suit against adults and infants on *pro confesso* against the former, without proof, and this court on that account reverse the decree, the *pro confesso* as to the adults will not thereby be set aside. The cause will proceed as if no decree had been pronounced. *Ib.*

6. Where a purchaser, under execution at law, of real estate, to which the judgment debtor had but a bond for title, files his bill against the vendor, averring that the whole purchase-money was paid by the judgment debtor before the sale under execution, and demanding title; and the vendor answer, denying the payment by the vendee, and averring the cancelment of the sale, and delivery up of the title bond, before the sale under execution: *Held*, that the purchaser, at the sheriff's sale, must prove satisfactorily that the whole purchase-money has been paid, or his bill will be dismissed.

Moody v. *Farr*, 100.

7. A vendor of land who takes no separate or other security for the purchase-money, retains a lien upon the land for its payment; and none but *bona fide* purchasers, without notice, can set up an implied waiver of this equitable mortgage. *Upshur* v. *Hargrove*, 286.

8. To constitute a *bona fide* purchaser without notice, the party must have advanced a new consideration, or have relinquished some security for a pre-existing debt. *Ib.*

9. U. purchased a tract of land of H., and agreed to pay for it with other lands if title could be had to them; if not, with a stipulated sum; upon which H. conveyed the land to U.'s wife; the title to the other lands not being made, H. filed his bill against U. and wife to subject the land sold by him, to the payment of the stipulated sum, the purchase-money thereof: *Held*, that the land was subject to the vendor's lien. *Ib.*

10. Where a bill in chancery sets up an award of arbitrators, and traces the claim of the complainant through it, the award will be held *prima facie* good, on *pro confesso*, even though the bill does not aver that the award was made upon notice. *Ib.*

11. Where the demurrer to a bill is overruled and the defendant allowed ninety days in which to answer; and the complainant die before the next term of the court, and the bill is revived at that term in favor of the administrator of the complainant; and on the same day of the revival, the defendant having failed to answer, the bill is taken for confessed against him, and a decree entered accordingly, it will be error; the defendant should have been allowed some day for the purpose of answering the bill of revivor. *Ib.*

12. In order to authorize a publication against a non-resident defendant to a suit in chancery, it must appear in the record, by affidavit, that such defendant is a non-resident of the state; an affidavit, therefore, merely that he is a citizen of a different state will not be sufficient.

McKiernan v. *Massingil*, 375.

13. By the law regulating the territory of Mississippi before it was made a state,

Digitized by Google

chancery jurisdiction was conferred on the supreme court; which was a court of general jurisdiction, and the sheriff its officer, who was bound by law to execute its process. Where, therefore, a bill was filed in that court against adults and infants, to foreclose a mortgage, and the process which was directed to the defendants, commanding them to appear and answer, was returned "*served*" by the sheriff, and a decree rendered thereon; *held*, that the process and return were sufficient to uphold the decree.

Doe v. *Bradley*, 485.

14. Where a bill was filed by J. against the state, to recover the amount of an alleged indebtedness, to which the state, by her officer, answered that the legislature had by law authorized the governor, auditor, and commissioner of public buildings, to examine J.'s accounts, and make him such allowance as they might find him entitled to, and that they had examined J.'s accounts, and found that there was nothing due him: *Held*, that the answer of the state, setting up this matter in avoidance of the bill, must be established by strict proof; and the certificate of these officers to the effect set up in the answer, but which did not state that J. submitted to them his accounts for examination, or was present when his accounts were exhibited, will not be sufficient evidence to maintain the answer.

Jack v. *The State*, 494.

15. G. & B. S. administered upon the estate of M. S., when O. obtained judgment at law against them as such administrator. G. & B. S. resigned their office, and J. R. G. was appointed administrator *de bonis non*, took possession of the estate, used and wasted the assets, and died insolvent, and without personal representatives. D. was appointed administrator *de bonis non* of M. S. and represented the estate insolvent; whereupon O. filed his bill in chancery, against the sureties of J. R. G. on his bond, to compel them to pay his judgment: *Held*, that a court of chancery had no jurisdiction of the bill. *Buckingham* v. *Owen*, 502.

16. The act of 1843, in its 9th, 10th, and 11th sections, directing the trustees to proceed to collect the debts and property of the bank for the benefit of creditors, to be applied as thereafter directed by law, constitutes the property of the bank a trust fund for the benefit of creditors, which no subsequent legislation can appropriate otherwise; and if the legislature fail to direct the mode of distribution among the creditors, a court of chancery will execute the trust. *Neritt* v. *The Bank of Port Gibson*, 513.

17. When a complainant, in addition to the general allegations in his bill, propounds special interrogatories to the defendant, the direct answers of the defendant to such interrogatories, are evidence for as well as against him, and will be conclusive, unless shown to be false: nor will any presumption be indulged against such evidence, on account of its being furnished by a party interested. *Petrie* v. *Wright*, 647.

18. Where a party agrees to make a security in future, that is construed in equity as an equitable mortgage; but the equitable mortgage becomes

Digitized by Google

merged whenever a mortgage is executed according to the agreement of the parties. *Ib.*

19. P. gave a mortgage to a railroad company, as a security for the performance of certain work, and the chancellor rendered a decree of foreclosure of the mortgage, for a balance found to be due by P. to the company, on an account stated between them: *Held*, that the mortgage being a mere security for the performance of work, and not for the payment of a debt, the decree was erroneous. *Ib.*

20. Where a party wishes to obtain relief in equity against a judgment recovered against him in an action at law, to which he had a valid legal defence, though it was unknown to him at the time the judgment was rendered, it will not be sufficient to allege in his bill that the grounds of defence were not known to him at the time of the trial at law; he must also aver that he could not have obtained such knowledge by the use of ordinary diligence.

Leggett v. *Morris*, 723.

21. L. filed his bill to be relieved against a judgment at law recovered against him by M.; he alleged that he was in partnership with C. in erecting a saw-mill; that a settlement and dissolution of the firm took place, and C. agreed to pay all the debts, the debt to M. being one of them; that the note on which the judgment was recovered, was executed after the settlement, but antedated, and the signature of the firm of L. & C. attached without authority from L. It was also alleged that M. knew that C. had undertaken to pay all the debts of the firm, and did not object. In an amended bill, it was stated that L. had no knowledge of the material facts set forth in his original bill until after the judgment at law. M. filed a demurrer to the original and amended bills, which was sustained by the court below, and the bills dismissed. *Held*, that the bills did not make a sufficient showing for relief in a court of equity, and that the demurrer was properly sustained. *Ib.*

CIRCUIT COURT.

1. Where an issue has been made up in the probate court and sent to the circuit court, for trial before a jury upon the rendition of the verdict, the issue must be sent back to the probate court for judgment; and if the circuit court undertake to render a judgment upon such verdict, that judgment will be a nullity. *Wallace* v. *Wingate*, 151.

2. Where a circuit court has rendered a judgment upon a verdict on an issue from the probate court, no appeal or writ of error can lie from such judgment, it being a nullity; and if one be prosecuted it will be dismissed. *Ib.*

3. If the probate court, after the trial of an issue from it in the circuit court, refuse to grant a new trial, the whole proceedings may be brought up to the high court of errors and appeals for revision in all their parts. *Ib.*

CIRCUIT COURT OF UNITED STATES.

1. A non-resident being sued in a state court for a sum exceeding five hun-

Digitized by Google

dred dollars, is entitled, under the act of congress, on the performance of the necessary requirements, to have the suit transferred to the next term of the United States circuit court for the district where he was sued; and on proper application to the state court it will be error for that court to refuse the transfer. *Hill* v. *Henderson*, 351.

2. Nor will it make any difference if such non-resident be sued as executor; he will still be entitled, on the proper showing, to the removal of his cause to the United States court. *Ib.*

3. If the United States court and the state court wherein such non-resident be sued, commence their session on the same day, a fair construction of the act of congress will give the non-resident the right to have the transfer made and returned to the next succeeding term of the court. *Ib.*

CITIZEN.

It is the policy of our state to prevent free persons of color remaining in it; nor does that policy conflict with the constitution of the United States, which declares "that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states;" as no person of color can become a citizen in the sense of the term used in the constitution. *Leech* v. *Cooley*, 93.

CLAIMS AGAINST THE STATE.

1. J. having a claim against the state, the legislature passed a law by which the governor, the auditor, and commissioner of public buildings were authorized to examine J.'s accounts, and to make him such allowance as they might find him entitled to: *Held*, that if J. assented to the law by having his accounts examined under it, and they decided against him, he was precluded from making further claim. *Jack* v. *The State*, 494.

2. Where a bill was filed by J. against the state to recover the amount of an alleged indebtedness, to which the state by her officer answered, that the legislature had by law authorized the governor, auditor, and commissioner of public buildings to examine J.'s accounts and make him such allowance as they might find him entitled to; and that they had examined J.'s accounts, and found that there was nothing due him; *held*, that the answer of the state setting up this matter in avoidance of the bill, must be established by strict proof; and the certificate of these officers to the effect set up in the answer, but which did not state that J. submitted to them his accounts for examination or was present when his accounts were exhibited, will not be sufficient evidence to maintain the answer. *Ib.*

COLLATERAL SECURITY.

1. A creditor who takes collateral security for his debt, is bound to hold it impartially and justly; and if it be lost by his negligence or improper con-

Digitized by Google

duct, the surety on such debt may bar the creditor of so much of his demand as he might have received from such collateral.

Payne v. *The Commercial Bank of Natchez*, 24.

2. L. being indebted to a bank on sundry notes as maker and indorser, on some of which notes other persons were bound as sureties for him, proposed an arrangement to the bank for their adjustment, by the substitution of his individual note, for the entire sum due, to be secured by confession of judgment to bind his property in Louisiana, to which proposal the bank acceded, to be complete when proper evidence of its consummation was given to the bank. Previous to this proposal, L. had deposited with the bank two hundred shares of bank stock as collateral security for the payment of these notes, having first sold his property in Louisiana, and executed his note and confessed the judgment in favor of the bank, without notifying the bank, or the bank's ratifying it; execution issued on this judgment, and the sheriff, to whose hands it came in Louisiana, sold the bank stock for $2200 to B., and gave him an order on the bank for it, which delivered it to B.; the bank never received the proceeds of the sale of the bank stock, nor did it appear what had become of them. *Held*, in a suit by the bank on the original notes, that the parties to them were not entitled to a credit thereon for the amount of said stock, as the security of the stock had not been lost; for if the sheriff's sale changed the title, its proceeds would be within their reach; and if the sale had not changed the title, the stock would be subject to their order. *Ib.*

3. Where the holder of one of a series of notes secured by mortgage, upon the arrest on mesne process of the judgment debtor, discharges the debtor from the arrest, and at the same time receives a steamboat from him as collateral security, which he afterwards exchanges with the debtor for notes also as collateral, which prove worthless; the holder of the assigned note does not thereby discharge the lien of the mortgage as to the note so held by him. *Terry* v. *Woods*, 139.

COMMISSION.

A commission which issues from the office of the circuit clerk, for the purpose of taking a deposition, which does not contain the name of any commissioner at the time it issues from the clerk's office, will be irregular and the deposition taken under it must be excluded. *Rupert* v. *Grant*, 433.

COMITY.

1. Whether an action can be maintained in the courts of Mississippi, by the bearer of a note payable to bearer; which note was made in the State of Alabama, where a statute provides that no one can maintain an action as the bearer of a promissory note? *Quære?*

2. Where a defence is based upon the provisions of a statute of another

Digitized by Google

state, the statutes in order to make the defence available, must be produced and proved. *Hemphill* v. *The Bank of Alabama*, 44.

CONDITIONS PRECEDENT.

1. He who wishes to avail himself of a contract containing conditions precedent on his part to be performed, in pleading must plead performance of those conditions precedent, and in making proof must prove performance of them. *Fultz* v. *House*, 404.
2. H. executed a deed of trust on certain slaves and other property to F. as trustee to secure E. in the payment of certain notes due him by H. After the execution of the notes and deed of trust, H. and E. had an agreement by which they arranged the terms of the settlement of the debt and deed of trust; part of those terms were that H., by a day named, was to deliver up to E. the slaves named in the deed of trust; at the end of this agreement was this clause: "Whenever the above stipulations of compromise are complied with, it is to be a full settlement of all debts and demands of either party against the other, and a full release either at law or in equity." H. having failed to deliver up the negroes as stipulated, F., the trustee, brought an action of replevin against J. H., who had one of them in possession, for the slave; the court below instructed the jury on the trial of the replevin, that the agreement of compromise changed the title to the slaves out of F. the trustee, and vested it in E. who alone could recover. *Held*, that the instruction was erroneous; that no part of the agreement went into effect until H. had performed his condition precedent, of delivering the shares to E. *Ib.*

CONSIDERATION.

M. introduced negroes into this state as merchandise since May, 1833, and sold them to C., who gave a bill of exchange in payment; which not being paid, a compromise was made, by which C. lifted the bill and gave his note instead; afterwards another compromise was made, by which C. was to give up to M. the negroes then living, and execute a bond with surety for a fixed sum, which compromise was carried out. *Held*, in an action on the bond thus given by C. and his surety, that these renewals and compromises did not change the character of the contract between the parties; all the subsequent contracts and agreements depending on the original illegal consideration were void; and no recovery could be had on the bond. *Collins* v. *McCargo*, 128.

CONSTITUTION OF THE STATE.

1. No action can be sustained by the vendee against the vendor of negroes introduced into this state as merchandise since May, 1833, for a breach of the vendor's warranty of the soundness of such negroes; the contract of sale and the warranty of soundness being void. *Collins* v. *McCargo*, 128.

Digitized by Google

2. M. introduced negroes into this state as merchandise since May, 1833, and sold them to C., who gave a bill of exchange in payment, which not being paid, a compromise was made, by which C. lifted the bill, and gave his note instead; afterwards another compromise was made, by which C. was to give up to M. the negroes then living, and execute a bond with surety for a fixed sum, which compromise was carried out; *Held*, in an action on the bond thus given by C. and his surety, that these renewals and compromises did not change the character of the contract between the parties; all the subsequent contracts and agreements depending on the original illegal consideration were void, and no recovery could be had on the bond. *Ib.*

3. The provisions of the act of the legislature of 1843, (sessions act 55,) entitled "An Act prescribing the mode of proceeding against incorporated banks for a violation of their franchises, &c." which provides that when a judgment of forfeiture is entered against a bank in proceedings under that act, its debtors shall not thereby be released from their debts and liabilities, but that the court rendering such judgment shall appoint one or more trustees to take charge of the books and assets of the bank, to sue for and collect all debts due to it, to sell all its property and apply the same as might be thereafter directed by law to the payment of its debts, do not impair the obligation of the contracts of the debtors of the bank, and are in all respects constitutional. *Nevitt* v. *Bank of Port Gibson*, 513.

4. All legislation which materially affects the laws for the enforcement of a contract existing at the time it is made, impairs the obligation of the contract. *Ib.*

5. The right of the legislature to remit a penalty or forfeiture imposed by law, exists and may be enforced without impairing the obligation of any contract to which the penalty or forfeiture may be attached. *Ib.*

6. The sixth section of the act of 1843, prescribing the mode of procedure against banks which have forfeited their charters, which authorizes the issuance of an injunction against the bank, to restrain it from the collection of its debts, is constitutional only when taken in connection, and regarded as part of the same law with the 9th, 10th, and 11th sections of the act, and which provide for the collection and preservation of the debts and assets of the bank for the benefit of creditors. *Ib.*

7. In the year 1840, a bank chartered previously, being in a state of suspension of specie payments, the legislature passed a law that all the banks in the state, by the 1st of April, 1840, should pay their fives in specie; by the 1st of July, their tens; by the 1st of October, their twentys, and by the 1st of January, 1841, their other notes and debts: *Held*, that this act was constitutional and valid; and a failure on the part of the bank to comply with the provisions of the law would work a forfeiture of its charter.
Commercial Bank of Natchez v. *The State*, 599.

8. An act of incorporation is a contract within the meaning of the constitution of the United States, and any legislative act which impairs it by enlarging

Digitized by Google

the power of the state over the body corporate, or by abridging its franchises, or which alters it in any material point, is void. *Ib.*

CONSTITUTION OF UNITED STATES.

1. It is the policy of our state to prevent free persons of color remaining in it, nor does that policy conflict with the constitution of the United States, which declares "that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states;" as no person of color can become a citizen in the sense of the term used in the constitution. *Leech* v. *Cooley*, 93.

2. The provisions of the act of the legislature of 1843, (sessions act 55,) entitled "An Act prescribing the mode of proceeding against incorporated banks, for a violation of their franchises," &c., which provide that when a judgment of forfeiture is entered against a bank, in proceedings under that act, its debtors shall not thereby be released from their debts and liabilities, but that the court rendering such judgment shall appoint one or more trustees to take charge of the books and assets of the bank, to sue for, and collect all debts due to it, to sell all its property, and apply the same as might be thereafter directed by law to the payment of its debts, do not impair the obligation of the contracts of the debtors of the bank, and are in all respects constitutional. *Nevitt* v. *The Bank of Port Gibson*, 513.

3. All legislation which materially affects the laws for the enforcement of a contract, existing at the time it is made, impairs the obligation of the contract. *Ib.*

4. The right of the legislature to remit a penalty or forfeiture imposed by law, exists, and may be enforced without impairing the obligation of any contract to which the penalty or forfeiture may be attached. *Ib.*

5. The sixth section of the act of 1843, prescribing the mode of procedure against banks which have forfeited their charters, which authorizes the issuance of an injunction against the bank to restrain it from the collection of its debts, is constitutional only when taken in connection, and regarded as part of the same law with the 9th, 10th, and 11th sections of the act, and which provide for the collection and preservation of the debts and assets of the bank, for the benefit of creditors. *Ib.*

6. In the year 1840, a bank chartered previously, being in a state of suspension of specie payments, the legislature passed a law that all the banks in the state by the first of April, 1840, should pay their fives in specie; by the first of July their tens; by the first of October their twentys, and by the first of January, 1841, their other notes and debts: *Held*, that this act was constitutional and valid; and a failure on the part of the bank to comply with the provisions of the law would work a forfeiture of its charter. *Ib.*

7. An act of incorporation is a contract within the meaning of the constitution of the United States, and any legislative act which impairs it by en-

Digitized by Google

larging the power of the state, over the body corporate, or by abridging its franchises, or which alters it in any material point, is void. *Ib.*

CONSTRUCTION.

1. Where the bill of exceptions taken by the plaintiffs to an order of the court setting aside the service of the writ after pleas were filed, and rendering a final judgment for the defendant, recites that the order thus excepted to was made on the motion of the *plaintiff*, while the judgment of the court itself, states that it was made on the motion of the *defendant*, the high court of errors and appeals will adopt the construction that the order was made on the motion of the defendant, as the most sensible and consistent with the whole record. *Wooten* v. *Wingate*, 271.
2. Where the record is itself contradictory in its parts, that construction must, if practicable, be adopted which will make it sensible and consistent, not one which is wholly absurd and will preclude relief. *Ib.*

CONSTRUCTION OF STATUTE.

1. Where in a subsequent statute there is no express repeal of a former one, the former statute will not be considered repealed by implication, unless the repugnancy between the new provision and the former one be plain and unavoidable. *The Planters Bank* v. *The State*, 628.
2. In the construction of statutes, the intention of the legislature is the cardinal rule of construction. *Ib.*
3. In 1843 the legislature passed a general law prescribing the mode of proceeding against banks that had violated their corporate franchises, (Acts of 1843, 52–57.) In the same year proceedings in the circuit court were commenced under that act against the Planters Bank. In 1844, the legislature passed another act in relation specially to the Planters Bank and one other bank, authorizing them, upon certain conditions, to surrender their charters; and upon their refusal to do so, making it the duty of the attorney-general and requiring him to proceed by bill in the superior court of chancery against them, have a receiver appointed to take charge of their property and proceed to have them wound up; the law of 1844 provided that if either of the companies should accept and comply with the conditions of the act by a voluntary surrender of its charter, then such bank should be released from the operations of the said law of 1843; the Planters Bank did not accept the conditions of the act of 1844, and the proceedings already instituted in 1843, under the law of that year having progressed to judgment in the circuit court against the bank, that court declaring its charter forfeited, and appointing trustees under the law of 1843 to collect its debts and take charge of its property, the bank appealed to this court, and the cause was here submitted on a preliminary motion as to whether the law of 1844 had not repealed the act of 1843, and taken away the jurisdiction of

Digitized by Google

the circuit court. *Held*, that there was no necessary repugnancy between the two acts, and therefore the latter did not by implication repeal the former; that no proceedings being instituted in the chancery court under the latter act, the circuit court did right to proceed to judgment under the law of 1843. *Ib.*

CONTINUANCE.

The allowance or disallowance of continuances is in the discretion of the inferior court, and when that is exercised it will not be revised by the high court of errors and appeals. *Muirhead* v. *Muirhead*, 451.

CONTRACT.

1. There must be a positive and binding agreement between the creditor and principal debtor, based upon some new and valuable consideration, sufficient to tie up the creditor, and prevent him from asserting any remedy, during the time for which the indulgence has been given, against the principal, in order to effect a release of the surety.

Payne v. The Commercial Bank of Natchez, 24.

2. L. being indebted to the Commercial Bank, in various notes, upon which he was liable, either as indorser or maker, and on which other persons were sureties for him, to reduce his liabilities to a single amount, proposed to the cashier of the bank to execute his individual note for the sum total due the bank, and confess a judgment, in Louisiana, on the note thus made, which judgment should bind all his property, and be in discharge of the notes on which he was liable; the cashier, on consultation with several of the directors, agreed to the arrangement, to be consummated when L. had, at his own expense, carried the arrangement into effect, and exhibited to the bank satisfactory evidence of it. L. after this agreement, and before he confessed the judgment, sold all of his property in Louisiana which the judgment was to bind, to B., and then executed his note for the sum total due the bank, and confessed the judgment, as agreed upon: *Held*, that the agreement of the bank, being purely conditional, and that condition not being complied with by L., the bank might disregard the arrangement with L. and sue upon the original notes against all the parties to them.

Ib.

3. Where in an action by a bank against the parties to a note held by it, it appeared in proof that the cashier of the bank had made an agreement which, if carried out, would have discharged all the parties to the note but one; and that he had made that agreement after consulting with two or more of the directors, and the court instructed the jury that the cashier of the bank had no authority to bind the bank by any contract that would release parties, but that if he acted on consultation with two or more of the directors, then his acts would be binding on the bank; *held*, that the entire instruction,

Digitized by Google

taken together, and applied to the facts, would not be erroneous in its conclusion. *Ib.*

4. It is a general rule, that in an action for the price of a chattel, the vendee may prove in defence deceit on the part of the vendor, and that the article was of no value; or he may show a partial unsoundness, in mitigation of damages. *Harmon* v. *Sanderson*, 41.

5. A purchaser cannot, by his own act alone, return and revest the property in the seller, and recover the price paid, on the ground of a total failure of consideration, nor can he by the same means protect himself from the payment of the price on the same ground. *Ib.*

6. In an action for the price of a chattel, proof that the representations of the seller, at the time of the sale, were fraudulent, and the article of no value, will alone warrant a verdict for the defendant, however far the evidence may extend, in mitigation of damages. *Ib.*

7. Whether the sale of a slave, under a deed of trust, by which the slave was conveyed to a trustee to secure a debt due the *cestui que trust*, will be valid if made by the trustee while the slave is in the adverse possession of another, and not present at the sale, *Quære?* *Hundley* v. *Buckner*, 70.

8. The following words, in a bill of sale of negroes, viz.: "Which negroes I warrant sound and healthy in body and mind, so far as I know or believe," constitute an unlimited warranty of soundness. *Collins* v. *McCargo*, 128.

9. No action can be sustained by the vendee against the vendor of negroes introduced into this state as merchandise, since May, 1833, for a breach of the vendor's warranty of the soundness of such negroes; the contract of sale and the warranty of soundness being void. *Ib.*

10. M. introduced negroes into his state as merchandise, since May, 1833, and sold them to C., who gave a bill of exchange in payment; which not being paid, a compromise was made, by which C. lifted the bill, and gave his note instead; afterwards another compromise was made, by which C. was to give up to M. the negroes then living, and execute a bond with surety for a fixed sum, which compromise was carried out: *Held*, in an action on the bond thus given by C. and his surety, that these renewals and compromises did not change the character of the contract between the parties; all the subsequent contracts and agreements depending on the original illegal consideration, were void, and no recovery could be had on the bond. *Ib.*

11. Where the holder of one of a series of notes, secured by mortgage, upon the arrest, on mesne process, of the judgment debtor, discharges the debtor from the arrest, and, at the same time, receives a steamboat from him as collateral security, which he afterwards exchanges with the debtor for notes, also as collateral, which prove worthless; the holder of the assigned note does not thereby discharge the lien of the mortgage as to the note so held by him. *Terry* v. *Woods*, 139.

12. Where the holder of one of a series of mortgaged notes indorsed the note to a third person before due; and after its maturity and non-payment, takes it up,

Digitized by Google

and becomes again the holder thereof, he will not thereby lose his recourse upon the mortgaged premises, but will be substituted again to his original rights. *Ib.*

13. An executor or administrator is not bound to pay the debts of his decedent, beyond the assets which he receives; nor will his written promise to do so make him liable, unless founded on other sufficient consideration. *Byrd* v. *Holloway*, 199.

14. B. & J. B. being sued by H. upon their joint note, offered to prove that the note was given in satisfaction of a decree of the probate court against B. as administrator of P. who in his lifetime was administrator of N. P., in favor of H. as administrator *de bonis non* of N. P., which evidence the court refused to admit: *Held*, that the evidence was admissible, and if the note were executed in settlement of that decree, B. & J. B. were not liable on it, unless B. had assets sufficient for its payment. *Ib.*

15. Where a party executes his notes, payable at fixed periods, for the purchase of a tract of land, and receives from the vendor a bond to make title to the land; and the vendor sue on the notes to recover the purchase-money, the contracts are independent, and the vendor may recover, although he has not made a deed to the land. *Hazlip* v. *Noland*, 294.

16. Where a vendor of land, in his bond for title, describes the land as lying on a certain creek in the county, in certain sections, without giving the particular subdivisions of the sections, or the township and range in which the land lies; the description of the land will be sufficient to uphold the consideration of the notes given for the purchase-money; as the location on the particular creek removes the uncertainty as to the subdivisions and township. *Ib.*

17. Where a vendor of land has given a bond for title, without affixing any time in which it is to be made, and takes notes, payable at a fixed time, for the purchase-money; and afterward, but before the notes are paid, executes a defective deed to the vendee, he will not thereby be deprived of his right to recover on the notes; as the execution of the defective deed does not absolve him from the obligation of his bond to make a good title; which the vendee may still demand. *Ib.*

18. Whether, where a vendee of land who has a bond for title from the vendor, dies before paying the purchase-money, and his administrators are sued therefor, the administrators can object to a deed from the vendor, made but not delivered before the vendee's death, for insufficiency or imperfection, so as to call in question the validity of the land, by way of assailing the validity of the notes. *Quære? Ib.*

19. Whether, where a vendor who has given a bond for title recites in his deed conferring title that he grants, bargains, and sells the land, and in the conclusion of the deed warrants the title only against himself and heirs, he thereby limits the statutory warranty given to the words, grant, bargain, and sale. *Quære? Ib.*

Digitized by Google

20. A warranty does not pass title, but only secures an indemnity if there be incumbrances. A vendor of land who has given a bond to make title, it seems therefore, may, under some circumstances, comply with his bond by giving a deed to the land, with special warranty. *Ib.*

21. Where, to an action on a bond, the defendant pleaded that the bond was given for the hire of a negro for a year, and the negro was taken out of the defendant's possession on a certain day, before the expiration of the hire, by the payee of the bond, to which the plaintiff replied in substance, that the contract of hire was that the plaintiff might at any time take possession of the negro by deducting twelve dollars per month for the unexpired time; and possession had been accordingly taken; to which replication the defendant demurred, and the court overruled the demurrer and gave judgment final against the defendant for the amount due upon the bond, after deducting the period of the negro's absence; *held*, that the judgment final was erroneous; the court should have awarded a judgment with a writ of inquiry. *Grover* v. *Gaunt*, 317.

22. To a declaration on a bond for the payment of money, the defendant plead that the bond was executed for the hire of a negro by the plaintiff to the defendant from January 1st, 1841, to January 1st, 1842, and that the negro, during that period, should not be removed from the defendant's possession; yet the plaintiff did, on the 3d day of May, 1841, take the negro out of the defendant's possession, by which the consideration of the writing obligatory had failed; the plaintiff replied, that when the negro was hired, it was agreed between the plaintiff and defendant, that if the plaintiff should want the negro before the first day of January, 1842, the defendant should give her up, deducting twelve dollars per month for the unexpired time; and that the defendant had the negro until the 3d day of June, 1841, *without this* that the plaintiff agreed that the negro should stay the whole year as averred by the defendant: *Held*, on demurrer, that the plea was good in substance and form. *Ib.*

23. Whatever the private agreements and contracts of persons, who conduct themselves before the world as partners, may be, with reference to debts contracted by them, and the responsibilities of the partners respectively, they will be equally and jointly liable to those dealing with the partnership, for all debts lawfully contracted. *Perry* v. *Randolph*, 335.

24. In an action by P. against D. & R. as partners in a race-course, for work done on the course, it was in proof that D. & R. had signed articles to establish, carry on, and complete the race-course, at mutual expense and mutual profit, for five years, at the end of which time R. was to pay D. for half the improvements, and be the sole proprietor; D. to superintend the course and the erection of the improvements; but the articles contained the clause, that "they were not to be so construed as to make the parties partners in the contracting of debts;" D. employed P. to do the work on the course: *Held*, that the clause in the articles of agreement, about the con-

Digitized by Google

tracting of debts, could not operate to the exoneration of R. from the payment of debts contracted by D. for the purposes of the partnership, and that he would be liable to P. for the value of the work done by him upon the course. *Ib.*

25. In an action by P. against D. & R. as the owners, in partnership, of a race-course, for work done on the course, R. denied, under oath, the partnership; and, after proof of a written agreement between D. & R. for the construction of the course, at joint expense and profit, P. offered to prove that, though he was employed by D. to do the work, yet that R. was often present, giving orders and directions concerning it, and shared the profits of the course, after it was completed: *Held*, that the proof was admissible, as tending to establish the partnership in the race-course between D. & R., and their joint liability as partners, for the work done. *Ib.*

26. M. W. entered a tract of land, and in January, 1837, assigned the certificate of entry to D. In October, 1838, a judgment was rendered against M. W., under which the land was sold, and bought by H. in September, 1840, who sold by deed of warranty to W. in December, 1840, W. having in 1839 bought the same land from D. to whom a patent issued for it in December, 1841, and who conveyed it by deed to W. in 1844; W. filed a bill against H., alleging that H. misrepresented the nature of his title at the time of sale, and that he, W., had been evicted under a paramount title, and prayed a rescission of the contract of sale from H. to W. H. denied the misrepresentation, and there was no proof of eviction: *Held*, that the sale could not be rescinded, as the complainant had not made out a case of fraud or of plain and palpable mistake affecting the substance of the subject-matter of the contract; and that the bill must be dismissed without prejudice to W.'s remedies at law. *Willy* v. *Hightower*, 345.

27. He who wishes to avail himself of a contract containing conditions precedent on his part to be performed, in pleading, must plead performance of those conditions precedent, and in making proof, must prove performance of them. *Fultz* v. *House*, 404.

28. H. executed a deed of trust on certain slaves and other property to F. as trustee, to secure E. in the payment of certain notes due him by H. After the execution of the notes and deed of trust, H. and E. had an agreement, by which they arranged the terms of the settlement of the debt and deed of trust; part of those terms were, that H. by a day named, was to deliver up to E. the slaves named in the deed of trust; at the end of this agreement was this clause: "Whenever the above stipulations of compromise are complied with, it is to be a full settlement of all debts and demands of either party against the other, and a full release either at law or in equity." H. having failed to deliver up the negroes as stipulated, F., the trustee, brought an action of replevin against J. H., who had one of them in possession, for the slave; the court below instructed the jury on the trial of the replevin, that the agreement of compromise changed the title to the slaves

Digitized by Google

out of F. the trustee, and vested it in E., who alone could recover: *Held*, that the instruction was erroneous; that no part of the agreement went into effect until H. had performed his condition precedent of delivering the slaves to E. *Ib.*

29. The Commercial Bank of Manchester lent to C. & M. $12,000, for which they were to ship cotton to the merchants of the bank, to be shipped to Liverpool and sold for account of C. & M.; and the proceeds to be credited on the note of C. & M. for the sum lent; C. & M. shipped 200 bales of cotton which were sent to Liverpool, and for which the bank credited C. & M.'s note with $6,711 39 as the proceeds of sale; C. & M. not being satisfied with the credit thus given, it was *held*, that they had a right to show, by way of increasing the amount of offset, the quality of the crop of cotton of that year, the usual weight of the bales, and the average price at Liverpool about the time the sale took place.
The Commercial Bank of Manchester v. *Chisholm*, 457.

30. Nor in such case would the defendant be authorized to show that the notes of the bank, at and near the time of the maturity of the note, were at a discount in New Orleans, by way of increasing the amount of set-off; if any such inquiry be instituted into the value of the money loaned, it must be confined to the time of the loan, and the place where it occurred. *Ib.*

31. If the notes were at par value when received by C. & M., and the bank be by the contract liable for the difference of exchange, the measure of her liability would be the premium between par and exchange on Liverpool at the time of the sale of the cotton. *Ib.*

32. If the notes were below par when paid out by the bank, then the amount of discount on them must be added to that premium, so as to make them equivalent to par funds, at the time they were paid out. *Ib.*

33. By making a note payable at a particular bank, the parties are presumed to consent to be governed by such customs as may prevail in the bank with regard to making demand of payment. *Harrison* v. *Crowder*, 464.

34. The provisions of the act of the legislature of 1843, (sessions act 55,) entitled "An Act prescribing the mode of proceeding against incorporated banks for a violation of their franchises, &c." which provide that when a judgment of forfeiture is entered against a bank in proceedings under that act, its debtors shall not thereby be released from their debts and liabilities, but that the court rendering such judgment shall appoint one or more trustees to take charge of the books and assets of the bank, to sue for and collect all debts due to it, to sell all its property and apply the same as might be thereafter directed by law to the payment of its debts, do not impair the obligation of the contracts of the debtors of the bank, and are in all respects constitutional. *Nevitt* v. *Bank of Port Gibson*, 513.

35. All legislation which materially affects the laws for the enforcement of a contract, existing at the time it is made, impairs the obligation of the contract. *Ib.*

Digitized by Google

36. The right of the legislature to remit a penalty of forfeiture imposed by law, exists, and may be enforced without impairing the obligation of any contract to which the penalty or forfeiture may be attached. *Ib.*

37. An act of incorporation is a contract within the meaning of the constitution of the United States, and any legislative act which impairs it by enlarging the power of the state, over the body corporate, or by abridging its franchises, or which alters it in any material point, is void. *Commercial Bank of Natchez* v. *The State*, 599.

38. In this country a contract for overseers' wages is not an entire contract by the year; and although an overseer may contract for a year, and may be turned out for misconduct before the time expires, he is, notwithstanding, entitled to recover for the time he conducted himself properly. *Harriston* v. *Sale*, 634.

39. An overseer, having been engaged, cannot put another in his place, though equal to himself in capacity, without the consent of his employer. *Ib.*

40. H. engaged S. as an overseer for a year, at $650; before the year expired, S. left without the knowledge or consent of H., though he employed a substitute, who, during the absence of S., conducted the business of H. equally as well as S. could have done. S. sued H. for his full wages, and the jury returned a verdict in favor of S. for the whole amount claimed, with interest. H. moved for a new trial, and the court below overruled the motion: *Held*, that the verdict was excessive, and a new trial should have been granted. *Ib.*

41. P. entered into a contract with the Jackson and Brandon Railroad and Bridge Company, by which he agreed to build a bridge over Pearl river, and to construct a turnpike road from the eastern end of the bridge to the termination of the swamp in an eastwardly direction, and the company agreed to pay him $37,500 for the bridge over the river; forty-four cents per cubic yard for making the embankment for the turnpike, and ten dollars per lineal foot for building all necessary bridges between the bridge over the river and the end of the turnpike at the termination of the swamp. Some time thereafter, P. entered into a contract with the Mississippi and Alabama Railroad Company, to which the Bridge Company were also parties, by which he agreed to construct a railroad, furnish materials, &c. from Jackson to Brandon, and the Railroad Company agreed to pay him therefor $204,000, and an extra sum for excavating rock; in the last contract there was a clause declaring that the Bridge Company had abandoned their scheme, and that they thereby assigned to the Railroad Company all their rights and privileges under their first contract with P.; but in the last contract it was expressly stipulated that the building of the bridge over Pearl river should not be included in P.'s obligations to the Railroad Company. *Held*, that the two contracts must be construed together, and that P. was entitled to receive from the Railroad Company the $37,500, forty-four cents per cubic yard for making the embankment, and two dollars per lineal foot for build-

Digitized by Google

ing bridges, in addition to the $204,000 and the extra sum for excavating rock. *Petrie* v. *Wright*, 647.

42. Corporations may contract under their corporate seal, by a vote of the directory entered on the books of the corporation, or by their agents acting within the scope of their authority, and binding contracts may be implied from their corporate acts without either a vote, deed, or writing. *Ib.*

43. W. P. contracted with the Mississippi and Alabama Railroad Company to build a railroad, furnish materials, an engine, &c., for which the company were to pay him a stipulated sum, a portion of which was to be advanced to enable him to purchase slaves to work on the road; and he was to execute to the company a mortgage on the slaves so purchased, as a security for the diligent and faithful performance of his duties on the road. They advanced the money, and he purchased the slaves and executed the mortgage. The company afterwards, to wit, on the 21st day of December, 1839, and before the road was completed, adopted several resolutions, by the first of which they released W. P. from his obligation to furnish an engine; by the second they directed his mortgage to be cancelled; and by the third, after admitting in a preamble that they had failed to supply him with par funds, they requested that he should proceed to finish the road at his own expense, and retain it until he should be repaid by the profits. They subsequently agreed that F. H. P. should be substituted as a contractor in the place of W. P., and that they would give him $15,000 to complete the road; W. P. at the same time gave his verbal promise to the company, that F. H. P. should finish the road. F. H. P. then, with the knowledge of the company, proceeded to work on the road, and continued to work on it for some time, though he never finished it. *Held*, that the resolutions, by substituting new terms and conditions inconsistent with the original agreement, amounted to an abandonment of the contract with W. P., and when taken in connection with the other circumstances and facts of the case, must be considered as a settlement of the balances between W. P. and themselves; and as a legal consequence, to a discharge of him from all obligations or liability to them, on account of his contract or mortgage. *Ib.*

44. P. contracted with the Mississippi and Alabama Railroad Company to build a railroad from Jackson to Brandon, for which he was to receive about $281,000, the money to be paid from time to time as P., in the construction of the road might, in his opinion, require it. The company failed to keep him supplied with par funds, and after paying him $298,026, most of which was in depreciated bank paper, they released him from the further prosecution of the road, and cancelled the mortgage he had given them for the diligent and faithful performance of the work on the road. When this release was given and the mortgage cancelled, P. claimed large damages against the company for their failure to comply with their contract; they refused to allow him the whole, but allowed him part of the amount claimed; and a final settlement took place between them; P. in his answer stated, and

Digitized by Google

several witnesses proved that the settlement was made in good faith, and fair; *held*, that even though P. may have received more than he was strictly entitled to, the settlement was not only binding on the company, but was legal and valid as against their creditors. *Ib.*

45. If conditions which are impossible or insensible be annexed to a contract, they are inoperative and void, and the obligation of the contract remains absolute, if it be not for doing an illegal thing; but if any sense or certainty can be made of the conditions they and the obligation shall all stand. *Merrill* v. *Bell*, 730.

46. B. deposited $ 1235 with M. in trust, to be returned whenever, within two years thereafter, B. would make, before any tribunal having competent jurisdiction therein, good and sufficient proof, satisfactory to the administrator of E., of the payment by B. on the 15th day of May, 1837, to E. or his duly authorized agent, of the sum of $ 950, to apply on certain payments to be made by B. to L. in pursuance of certain articles of agreement made and entered into by B. and L., dated January 5th, 1837, whether the same shall appear to have been paid by a note or notes, or in cash: *Held*, in an action by B. against M. to recover back the $ 1235, that the conditions, so far as they relate to the manner of making the proof and its sufficiency, are inoperative, and B. was entitled to recover if he could prove the payment of the $ 950 to E., or the duly authorized agent of L., without having made any preliminary proof to a tribunal or to E.'s administrator. *Ib.*

CORPORATIONS.

1. Where, in an action by a bank against the parties to a note held by it, it appeared in proof that the cashier of the bank had made an agreement which, if carried out, would have discharged all the parties to the note but one; and that he had made that agreement after consulting with two or more of the directors, and the court instructed the jury that the cashier of the bank had no authority to bind the bank by any contract that would release parties, but that if he acted on consultation with two or more of the directors, then his acts would be binding on the bank: *Held*, that the entire instruction taken together and applied to the facts, was not erroneous in its conclusion. *Paine* v. *The Commercial Bank of Natchez*, 24.

2. In an action of assumpsit by a bank upon a promissory note payably to itself, it is not competent for the court, at the instance of the defendant, to inquire into the organization of the bank, or as to fraud in the taking of its stock. *Smith* v. *Mississippi and Alabama Railroad Company*, 179.

3. Where, in a proceeding by information in the nature of a *quo warranto* against a bank, the court was asked to charge the jury that if they believed from the evidence that the cashier or teller or clerks of the bank, as officers and agents of the bank, received either directly or indirectly from any one the notes of non-specie-paying banks, in payment for any part of the capital stock of the bank, they must find for the plaintiff; it was *held*, that the

Digitized by Google

charge was too broad; that to make a payment binding on a corporation, it should be made to some agent authorized to receive it; and that the charge as asked, was properly rejected. *The State* v. *The Commercial Bank of Manchester*, 218.

4. The acts of a cashier of a bank are only binding upon the bank when he acts within the sphere of the agency prescribed to him; if there be no express regulation or restriction, all acts which appertain to his office will affect the bank; if he be restricted or limited in the scope of his agency, by the bank, the act of the cashier in violation of the restriction or beyond the limit will not be the act of the bank. *Ib.*
5. In a proceeding against a bank by information in the nature of a *quo warranto*, the acts of the cashier when proved will be *prima facie* binding on the bank, when performed in the discharge of the ordinary duties which belong to that officer, and in order to avoid such acts of the cashier, it devolves upon the corporation to show a special restriction imposed upon the cashier by the directors. *Ib.*
6. A directory of a bank may, through its cashier, violate the charter of the bank; if, however, they can show that in the particular act of the cashier, alleged to be a violation of the charter, he departed from his duties as prescribed by them, such act will not cause a forfeiture of the charter. *Ib.*
7. Where, in an information in the nature of a *quo warranto* against a bank, the court was asked to charge the jury, that "if they believed from the evidence that it was agreed between the cashier of the bank and M., a holder of part of the capital stock of the bank, that he should, to make payment of his stock and evade the charter of the bank, procure the notes of the bank, which was then a non-specie-paying bank; that the cashier should receive the notes, count out their amount in specie, and immediately take or receive back said specie, without M. being at liberty to take the same away from the bank, and that he should thereupon receive a certificate of stock; and that said M. did so pay an instalment on his stock, and receive a certificate, they must find for the plaintiff; there being proof that the board of directory had positive directions that nothing but gold or silver, or the notes of specie-paying banks should be received in payment of stock; it was *held*, that the charge, as asked, was properly refused, not having reference to the testimony before the jury. *Ib.*
8. If a plea of *nul tiel corporation*, supported by affidavit, be filed to a declaration by a bank on a note, and issue be joined thereon, and the bank introduce in evidence a copy of the act of its incorporation with proof of user under the charter, it is sufficient to entitle it to recover. *Henderson* v. *Mississippi Union Bank*, 314.
9. The provisions of the act of the legislature of 1843, (sessions act 55,) entitled "An Act prescribing the mode of proceeding against incorporated banks for a violation of their franchises, &c." which provide that when a judgment of forfeiture is entered against a bank in proceedings under that

Digitized by Google

act, its debtors shall not thereby be released from their debts and liabilities, but that the court rendering such judgment shall appoint one or more trustees to take charge of the books and assets of the bank, to sue for and collect all debts due to it, to sell all its property, and apply the same as might be thereafter directed by law to the payment of its debts, do not impair the obligation of the contracts of the debtors of the bank, and are in all respects constitutional. *Nevitt* v. *Bank of Port Gibson*, 513.

10. All legislation which materially affects the laws for the enforcement of a contract, existing at the time it is made, impairs the obligation of the contract. *Ib.*

11. The right of the legislature to remit a penalty or forfeiture imposed by law, exists, and may be enforced without impairing the obligation of any contract to which the penalty or forfeiture may be attached. *Ib.*

12. Where a bank has forfeited its charter, it is a legitimate and proper exercise of legislative power to provide by law for the preservation of the property of the bank for the benefit of its creditors, by remitting the penalties which attach to a judicial judgment of forfeiture of its charter. *Ib.*

13. The sixth section of the act of 1843, prescribing the mode of procedure against banks which have forfeited their charters, which authorizes the issuance of an injunction against the bank, to restrain it from the collection of its debts, is constitutional only when taken in connection, and regarded as part of the same law with the 9th, 10th and 11th sections of the act, and which provide for the collection and preservation of the debts and assets of the bank for the benefit of creditors. *Ib.*

14. When a judgment of forfeiture has been rendered against a bank in proceedings under the act of 1843, and trustees have been appointed by the court rendering the judgment, all suits pending in the name of the bank, whether at law or in equity, may be revived at the instance and in the name of the trustees; and the action will progress in the name of the trustees, in the same manner and to the same effect that a suit is revived in the name of an executor or administrator, which was pending in the lifetime of the testator or intestate. *Ib.*

15. The act of 1843, in its 9th, 10th, and 11th sections, directing the trustees to proceed to collect the debts and property of the bank for the benefit of creditors, to be applied as thereafter directed by law, constitutes the property of the bank a trust fund for the benefit of creditors, which no subsequent legislation can appropriate otherwise; and if the legislature fail to direct the mode of distribution among the creditors, a court of chancery will execute the trust. *Ib.*

16. A judgment of forfeiture against a bank, and appointment of trustees under the act of 1843, is an assignment by operation of law, of all the property of the bank to the trustees for the benefit of creditors; which relates back to the period of the issuance of the injunction against the bank

Digitized by Google

under the act, and preserves the assets and property of the bank from that time, for the benefit of the creditors. *Ib.*

17. A judgment of forfeiture against a bank under the act of 1843, has none of the common law consequences of a judgment of forfeiture; the legislature having waived its right to the common law penalties, by providing that concurrently with the judgment of forfeiture, the assets and property of the bank shall vest in trustees for the benefit of creditors of the bank. *Ib.*

18. The mere judgment of forfeiture does not *ipso facto*, work a dissolution of the corporation; there must be first execution for the seizure of the franchises before the penalties of forfeiture take place. *Ib.*

19. In a proceeding against a corporation, as such, for forfeiture of charter, the performance of conditions precedent to the existence of the corporation cannot be inquired into; its existence as a corporation is admitted by the proceedings against it. *Commercial Bank of Natchez* v. *The State*, 599.

20. The charter of the Commercial Bank of Natchez provided that no person, firm or corporation, should in the original subscription for stock, on any one day, subscribe directly or indirectly, or procure any other person to subscribe, with the understanding that it should be transferred after the books were closed, for more than fifty shares of stock; in a proceeding by *quo warranto* against the bank, it was alleged as ground of forfeiture, that more than fifty shares had been subscribed for, in violation of that section of the charter, and that the stock had been afterwards transferred: *Held*, that these subscriptions for stock being under the superintendence of eight commissioners named in the charter, and under their supervision, and before the bank had a corporate existence, the bank, as such, would not be held responsible for the violation of law of those commissioners who were the agents of the state. *Ib.*

21. *Bona fide* subscriptions to stock in a bank cannot be affected by irregularities which occurred in the subscriptions for stock preliminary to the organization of the bank, made under the supervision of agents of the state, appointed for the purpose of organizing the bank. *Ib.*

22. It was provided in the charter of a bank, that "should any stockholder refuse or fail to pay any instalment on his stock when called for, the company shall sell said stock, on giving thirty days' notice in some gazette, on account of, and at the risk of the stockholder:" *Held*, that failure on the part of the bank to comply with this provision, was not a cause of forfeiture of the charter of the bank; the authority to sell the stock was a mere cumulative remedy given to the corporation to enable it to coerce the payment of stock in a more speedy manner than by action at law. *Ib.*

23. A refusal by a bank, on proper application, to pay its notes, bills, bonds and other liabilities issued by the bank, in specie, is a cause of forfeiture of the charter of such bank. *Ib.*

24. The charter of a bank contained no provision which in so many words required the bank at all times to pay specie; by its charter the capital stock

Digitized by Google

was to be paid in gold or silver, or the notes of specie-paying banks; and the bank was prohibited from issuing notes to a greater amount than three times the amount of the capital stock paid in; by another section of the charter it was provided that if the bank refused to pay its notes on demand, the holder might demand an interest of twelve and a half per cent. per annum on such notes, the payment of which had been refused. In a proceeding by *quo warranto* against the bank, it was alleged, as cause of forfeiture, that the bank on the first day of November, 1841, and on divers other days before and since, did refuse, on demand being made at its counter in its banking house during the regular hours for doing business, to redeem in specie or other lawful money of the United States, the notes, bills, bonds, and other liabilities issued by said bank, and then due: *Held*, on demurrer, that the cause of forfeiture was sufficiently pleaded, and the demurrer must be overruled. *Ib.*

25. In a proceeding against a bank for forfeiture of charter, alleging as cause of forfeiture, a suspension of specie payments, the answer of the bank that it paid all its notes and liabilities except certain checks which it had drawn on another bank, for payment of which provision had been made with that bank, but it failed to pay them, and they were returned; and on being returned, the bank which issued them was unable to take them up at the time, but in two years afterwards, and before the commencement of any proceedings against it, it resumed specie payment on those checks and all other liabilities, whenever payment was demanded at its counter, and was then paying specie, was *held* not to be a sufficient answer to the charge of forfeiture and no excuse for the suspension. *Ib.*

26. How far a mere temporary suspension of specie payments will work a forfeiture of charter, and what is a *temporary* suspension? *Quære? Ib.*

27. In the year 1840, a bank chartered previously, being in a state of suspension of specie payments, the legislature passed a law that all the banks in the state by the first of April, 1840, should pay their fives in specie; by the first of July their tens; by the first of October their twentys, and by the first of January, 1841, their other notes and debts: *Held*, that this act was constitutional and valid; and a failure on the part of the bank to comply with the provisions of the law would work a forfeiture of its charter. *Ib.*

28. An act of incorporation is a contract within the meaning of the constitution of the United States, and any legislative act which impairs it by enlarging the power of the state, over the body corporate, or by abridging its franchises, or which alters it in any material point, is void. *Ib.*

29. P. entered into a contract with the Jackson and Brandon Railroad and Bridge Company, by which he agreed to build a bridge over Pearl River, and to construct a turnpike road from the eastern end of the bridge to the termination of the swamp in an eastwardly direction; and the company agreed to pay him $37,500 for the bridge over the river, forty-four cents per cubic yard for making the embankment for the turnpike, and ten dollars per lineal

Digitized by Google

foot for building all necessary bridges between the bridge over the river and the end of the turnpike at the termination of the swamp. Sometime thereafter, P. entered into a contract with the Mississippi and Alabama Railroad Company, to which the Bridge Company were also parties, by which he agreed to construct a railroad, furnish materials, &c., from Jackson to Brandon, and the Railroad Company agreed to pay him therefor $204,000, and an extra sum for excavating rock. In the last contract, there was a clause declaring that the Bridge Company had abandoned their scheme, and that they thereby assigned to the Railroad Company all their rights and privileges under their first contract with P.; but in the last contract it was expressly stipulated, that the building of the bridge over Pearl River should not be included in P.'s obligations to the Railroad Company. *Held*, that the two contracts must be construed together, and that P. was entitled to receive from the Railroad Company the $37,500, forty-four cents per cubic yard for making the embankment, and ten dollars per lineal foot for building bridges, in addition to the $204,000, and the extra sum for excavating rock. *Petrie* v. *Wright*, 647.

30. Corporations may contract under their corporate seal, by a vote of the directory entered on the books of the corporation, or by their agents acting within the scope of their authority, and binding contracts may be implied from their corporate acts without either a vote, deed, or writing. *Ib.*

31. W. P. contracted with the Mississippi and Alabama Railroad Company to build a railroad, furnish materials, an engine, &c., for which the company were to pay him a stipulated sum, a portion of which was to be advanced to enable him to purchase slaves to work on the road; and he was to execute to the company a mortgage on the slaves so purchased, as a security for the diligent and faithful performance of his duties on the road. They advanced the money, and he purchased the slaves and executed the mortgage. The company afterwards, to wit, on the 21st day of December, 1839, and before the road was completed, adopted several resolutions, by the first of which they released W. P. from his obligation to furnish an engine; by the second they directed his mortgage to be cancelled; and by the third, after admitting in a preamble that they had failed to supply him with par funds, they requested that he should proceed to finish the road at his own expense, and retain it until he should be repaid by the profits. They subsequently agreed that F. H. P. should be substituted as a contractor in the place of W. P., and that they would give him $15,000 to complete the road; W. P. at the same time gave to the company his verbal promise, that F. H. P. should finish the road. F. H. P. then, with the knowledge of the company, proceeded to work on the road, and continued to work on it for some time, though he never finished it. *Held*, that the resolutions, by substituting new terms and conditions inconsistent with the original agreement, amounted to an abandonment of the contract with W. P., and when taken in connection with the other circumstances

Digitized by Google

and facts of the case, must be considered as a settlement of the balances between W. P. and themselves; and as a legal consequence, to a discharge of him from all obligations or liability to them, on account of his contract or mortgage. *Ib.*

32. A voluntary release of securities held by a corporation, is void as to creditors; yet if, in the settlement of mutual and conflicting claims, a corporation allow a debtor more than he is strictly entitled to, that is not of itself a fraud; there must be some device to injure others, or the act must be so grossly extravagant and wasteful, as to amount to a fraud in law. *Ib.*

33. P. contracted with the Mississippi and Alabama Railroad Company to build a railroad from Jackson to Brandon, for which he was to receive about $281,000; the money to be paid from time to time, as P., in the construction of the road might, in his opinion, require it. The company failed to keep him supplied with par funds, and after paying him $298,026, most of which was in depreciated bank paper, they released him from the further prosecution of the road, and cancelled the mortgage he had given them for the diligent and faithful performance of the work on the road. When this release was given and the mortgage cancelled, P. claimed large damages against the company for their failure to comply with their contract; they refused to allow him the whole, but allowed him part of the amount claimed, and a final settlement took place between them. P., in his answer, stated, and several witnesses proved that the settlement was made in good faith, and fair. *Held*, that even though P. may have received more than he was strictly entitled to, the settlement was not only binding on the company, but was legal and valid as against their creditors. *Ib.*

COSTS.

1. Where a slave has been prosecuted before a justice of the peace for larceny, under the statute, (H. & H. 164, § 40,) and the justice has adjudged the costs of the prosecution against the owner of the slave, the circuit court has jurisdiction of a *certiorari*, at the instance of the owner to determine whether so far as the judgment for costs extended, the decision of the justice had been according to law and facts. *Atchison* v. *Potter*, 120.

2. The statute, which subjects the master-employer or overseer of a slave convicted of larceny, to the costs of prosecution, designed to render the person who had the slave in charge at the time of the commission of the offence, liable for the costs; whether he were master-employer or overseer. It would seem, therefore, that a judgment for costs in such case against a master who had not the slave in his employ at the time of the offence, would be erroneous. *Ib.*

CUSTOM.

By making a note payable at a particular bank, the parties are presumed to

Digitized by Google

consent to be governed by such customs as may prevail in the bank with regard to making demand of payment. *Harrison* v. *Crowder*, 464.

DAMAGES.

In an action on a bond, payable in the notes of a particular bank, the measure of damages is the value of the notes at the time of the maturity of the bond, not its value at any subsequent period. *Lanier* v. *Trigg*, 641.

DEBTOR AND CREDITOR.

1. A creditor who takes collateral security for his debt, is bound to hold it impartially and justly; and if it be lost by his negligence or improper conduct, the surety on such debt may bar the creditor of so much of his demand as he might have received from such collateral.

Payne v. *The Commercial Bank of Natchez*, 24.

2. L. being indebted to a bank on sundry notes, as maker and indorser, on some of which notes other persons were bound as sureties for him, proposed an arrangement to the bank for their adjustment, by the substitution of his individual note for the entire sum due, to be secured by confession of judgment to bind his property in Louisiana, to which proposal the bank acceded; to be complete when proper evidence of its consummation was given to the bank. Previous to this proposal L. had deposited with the bank two hundred shares of bank stock as collateral security for the payment of these notes. H. having first sold his property in Louisiana, L. executed his note, and confessed the judgment in favor of the bank, without notifying the bank, or the bank's ratifying it; execution issued on this judgment, and the sheriff, to whose hands it came in Louisiana, sold the bank stock for $2200, to B., and gave him an order on the bank for it, which delivered it to B.; the bank never received the proceeds of the sale of the bank stock, nor did it appear what had become of them: *Held*, in a suit by the bank on the original notes, that the parties to them were not entitled to a credit thereon for the amount of said stock; as the security of the stock had not been lost; for if the sheriff's sale changed the title, its proceeds would be within their reach, and if the sale had not changed the title the stock would be subject to their order. *Ib.*

3. The act of 1843, in its ninth, tenth and eleventh sections, directing the trustees to proceed to collect the debts and property of the bank for the benefit of creditors, to be applied as thereafter directed by law, constitutes the property of the bank a trust fund for the benefit of creditors, which no subsequent legislation can appropriate otherwise; and if the legislature fail to direct the mode of distribution among the creditors, a court of chancery will execute the trust. *Nevitt* v. *The Bank of Port Gibson*, 513.

4. A judgment of forfeiture against a bank under the act of 1843, has none of the common law consequences of a judgment of forfeiture; the legislature having waived its right to the common law penalties by providing that con-

Digitized by Google

currently with the judgment of forfeiture, the assets and property of the bank shall vest in trustees for the benefit of creditors of the bank. *Ib.*

5. A voluntary release of securities held by a corporation, is void as to creditors; yet if, in the settlement of mutual and conflicting claims, a corporation allow a debtor more than he is strictly entitled to, that is not of itself a fraud; there must be some device to injure others, or the act must be so grossly extravagant and wasteful, as to amount to fraud in law.

Petrie v. *Wright*, 647.

6. P. contracted with the Mississippi and Alabama Railroad Company to build a railroad from Jackson to Brandon, for which he was to receive about $281,000; the money to be paid from time to time, as P. in the construction of the road might, in his opinion, require it. The company failed to keep him supplied with par funds, and after paying him $298,026, most of which was in depreciated bank paper, they released him from the further prosecution of the road, and cancelled the mortgage he had given them for the diligent and faithful performance of the work on the road. When this release was given and the mortgage cancelled, P. claimed large damages against the company for their failure to comply with their contract; they refused to allow him the whole, but allowed him part of the amount claimed, and a final settlement took place between them. P., in his answer, stated, and several witnesses proved, that the settlement was made in good faith, and fair. *Held*, that even though P. may have received more than he was strictly entitled to, the settlement was not only binding on the company, but was legal and valid as against their creditors. *Ib.*

DECREE.

1. In a suit in chancery against both adult and infant defendants, a decree rendered in favor of the complainants against all the defendants upon *pro confesso* against the adult defendants, and the answer of guardians *ad litem* for the infants without any proof, will be erroneous as to the infants even though time be reserved in the decree to the infants after they come of age to show cause against it. *Hargrove* v. *Martin*, 61.

2. Taking a case for confessed in equity, entitles the complainant to a decree only against the party as to whom the bill has been taken for confessed, not against the others; and if the defendant, against whom no *pro confesso* is taken disprove the bill, the whole will be dismissed. *Ib.*

3. A *pro confesso* against an infant will not authorize a decree against him; there must be proof; and a reservation of a right to show cause against the decree after the infant attains majority, does not cure the error. *Ib.*

4. Whether the reservation of a right in an infant to show cause against the decree after he attains majority, extends only to defects or errors in the decree itself, and is barred by a sale under the decree. *Quære? Ib.*

5. By the law regulating the territory of Mississippi before it was made a state, chancery jurisdiction was conferred on the supreme court; which was

Digitized by Google

a court of general jurisdiction and the sheriff its officer, who was bound by law to execute its process. Where therefore a bill was fi'ed in that court against adults and infants to foreclose a mortgage, and the process which was directed to the defendants, commanding them to appear and answer, was returned "*served*" by the sheriff, and a decree rendered thereon; *held*, that the process and return were sufficient to uphold the decree.

Smith v. *Bradley*, 179.

6. Where there has been a defective return upon process, it is a question of error or not in the rendering of the decree, and that decree cannot, on account of such defective return, be attacked collaterally in an action of ejectment against parties claiming under the decree. *Ib.*
7. A decree against infants, foreclosing a mortgage, which is rendered without giving a day after their coming of age, to show cause against the decree; and without appointing a guardian *ad litem* for them, or taking the bill for confessed against them, will not for such irregularities be made void. *Ib.*
8. A decree for the sale of mortgaged premises instead of a technical foreclosure, is binding on an infant, although no day be given, to show cause against it. *Ib.*
9. An infant defendant can, after he comes of age, only avoid a decree against him by showing errors in the decree; he cannot reinvestigate the subject-matter of the suit, nor can he redeem mortgaged premises which have been sold. *Ib.*
10. P. gave a mortgage to a railroad company, as a security for the performance of certain work, and the chancellor rendered a decree of foreclosure of the mortgage for a balance found to be due by P. to the company, on an account stated between them: *Held*, that the mortgage being a mere security for the performance of work, and not for the payment of a debt, the decree was erroneous. *Petrie* v. *Wright*, 647.

DEED.

1. Whether the certificate of the record of a deed made by a deputy of the probate clerk in his own name, and not in that of his principal, is a valid certificate. *Quære?* *Hundley* v. *Buckner*, 70.
2. Where a deed was offered in evidence, the certificate of the record of which was made and dated several years after the actual record of the deed, such certificate, unless there be evidence to disprove it, will be sufficient evidence of the proper record of the deed to admit it as testimony. *Ib.*
3. Where a vendor of land in his bond for title describes the land as lying on a certain creek in the county, in certain sections, without giving the particular subdivisions of the sections, or the township and range in which the land lies; the description of the land will be sufficient to uphold the consideration of the notes given for the purchase-money; as the location on the particular creek removes the uncertainty as to the subdivisions and township.

Hazlip v. *Noland*, 294.

Digitized by Google

4. Where a vendor of land has given a bond for title without affixing any time in which it is to be made, and takes notes payable at a fixed time for the purchase-money; and afterward, but before the notes are paid, executes a defective deed to the vendee, he will not thereby be deprived of his right to recover on the notes; as the execution of the defective deed does not absolve him from the obligation of his bond to make a good title, which the vendee may still demand. *Ib.*

5. Whether where a vendee of land, who has a bond for title from the vendor, dies before paying the purchase-money, and his administrators are sued therefor, the administrators can object to a deed from the vendor made but not delivered before the vendee's death, for insufficiency or imperfection, so as to call in question the validity of the bond by way of assailing the validity of the notes. *Quære? Ib.*

6. Whether were a vendor who has given a bond for title, recites in his deed conferring title that he grants, bargains and sells the land, and in the conclusion of the deed warrants the title only against himself and heirs, he thereby limits the statutory warranty given to the words *grant*, *bargain* and *sell*. *Quære? Ib.*

7. A warranty does not pass title, but only secures an indemnity if there be incumbrances. A vendor of land who has given a bond to make title, it seems therefore may, under some circumstances, comply with his bond by giving a deed to the land with special warranty. *Ib.*

8. Under a joint conveyance, the possession of one will be deemed the possession of both, unless there were an ouster. *James* v. *Rowan*, 393.

DEED OF TRUST.

1. The rule that if personal property be left in the possession of the grantor or vendor, it is evidence of fraud, has no application to deeds of trust or mortgages duly recorded; it is confined to absolute sales; the recording of the mortgage is equivalent to an actual delivery of the property.

Hundley v. *Buckner*, 70.

2. Where a trustee, to whom a slave has been conveyed as security for a debt, institute an action of detinue against a person not a party to the deed, for the recovery of such slave, the recital in the deed of trust and the production of the note, to secure which the negro was conveyed, will be *prima facie* evidence of the *bona fides* of the debt thus secured. *Ib.*

3. Whether the sale of a slave under a deed of trust, by which the slave was conveyed to a trustee to secure a debt due the *cestui que trust*, will be valid if made by the trustee while the slave is in the adverse possession of another, and not present at the sale. *Ib.*

DEMAND OF PAYMENT.

1. A greater strictness must be observed in making demand of payment at a bank having banking hours, than is necessary in personal demands. A per-

Digitized by Google

sonal demand may be made at any time during the third day of grace; but a constructive demand at a bank with business hours, must be made at the close of the business hours; for the maker has until that time to deposit the money for the payment of the note. *Harrison* v. *Crowder*, 464.

2. In an action against the indorser of a promissory note payable at a bank with banking hours, the notary testified that he had no recollection of the fact or time of presentment, except from his protest, from which he had no doubt that he did present the note; that when he protested the note sued on, his habit was to make demand of payment about the close of banking hours, believing that practice to conform to the law; when payment was refused, he took the note away with him; he could not say whether the note sued on had been presented an hour or a minute before the close of the bank, except from his habit of presentation: *Held*, that the testimony should have been left to the jury for them to say whether the demand on the note had been made about the close of banking hours. *Ib.*
3. The law does not prescribe impracticable rules; it seems, therefore, that when a note is payable at a bank having business hours, it is not absolutely essential that the note should be presented at the very moment of closing the doors of the bank, probably a few minutes would be regarded as of little consequence in the application of the rule. *Ib.*
4. Where in an action against the indorser of a note payable at a bank with business hours, the judge instructed the jury that a demand of payment "in some reasonable or convenient time before the doors were closed," would be sufficient; it was *held*, that the instruction was erroneous. *Ib.*

DEPOSITION.

1. A commission which issues from the office of the circuit clerk, for the purpose of taking a deposition, which does not contain the name of any commissioner at the time it issues from the clerk's office, will be irregular and the deposition taken under it must be excluded. *Rupert* v. *Grant*, 433.
2. Where a deposition has been excluded from the jury on the ground that the commission under which it was taken, was irregular in not having the name of the commissioner in it when it issued, the party who took the deposition cannot obtain a new trial on the ground of surprise in the exclusion of the deposition as that exclusion was owing to his own laches in irregularly suing out the commission. *Ib.*
3. Depositions taken in one suit are not admissible as evidence in another, unless both suits are between the same parties, or those who are privies in blood, in estate, or in law. *Merrill* v. *Ball*, 730.
4. In an action by B. against M., to recover $1235, deposited by B. with M., to be returned when B. should prove that he paid E. or his authorized agent, the sum of $950, to apply on certain payments to be made by B. to L. in pursuance of certain articles of agreement made and entered into by B. and L.; B. in order to prove the payment of the $950, to E. as agent of L.

Digitized by Google

introduced and read to the jury certain depositions which had been taken in a controversy pending in the probate court between L. and E.'s administrator, to recover money paid by B. to E. for L.: *Held*, that the depositions having been taken in a case to which B. was not a party, and M. only a party as the agent of L., were inadmissible to prove the payment in the suit between B. and M. *Ib.*

DESCRIPTION.

Where a vendor of land in his bond for title, describes the land as lying on a certain creek in the county, in certain sections, without giving the particular subdivisions of the sections, or the township and range in which the land lies; the description of the land will be sufficient to uphold the consideration of the notes given for the purchase-money; as the location on the particular creek removes the uncertainty as to the subdivisions and township. *Hazlip* v. *Noland*, 294.

DETINUE.

1. M. conveyed a slave to B. in trust to secure M. R. & Co. a debt; after the execution of this deed of trust, the slave conveyed by it was purchased under an execution against M. by H. on a judgment junior to the deed of trust. B. the trustee sold the slave while in the possession of H. and in the absence of the slave, under the deed of trust to L. R. M.; and thereupon B. instituted an action of detinue for the use of L. R. M. against H. to recover the slave: *Held*, that the action of detinue could not be maintained in the name of one for the use of another, and that therefore the name of the usee in the record was wholly surperfluous; an impertinent allegation and should be disregarded. *Hundley* v. *Buckner*, 70.
2. In an action of detinue the legal title alone is in controversy; if there be equities they must be settled in some other mode. *Ib.*

DEVASTAVIT.

1. If an executor, against whom, as such, various judgments have been obtained, use the assets of his testator in the payment of the junior judgments against him as such executor; leaving the oldest judgment unpaid, he will be guilty of a *devastavit;* and will be liable to a proceeding against him by *scire facias*, as such executor to subject him to the payment *de bonis propriis* of the judgment recovered against him as executor and thus left unpaid.
Black v. *Barton*, 239.
2. In such case the *scire facias* should state what amount of assets had come to the hands of the executor, as he would not be liable beyond that sum.
Ib.
3. The executor may plead to such *scire facias* notwithstanding the former judgment against him *plene administravit;* and will be discharged if he can

Digitized by Google

show a full and proper administration of the estate; such plea will not, however be supported if there has been a misapplication of assets. *Ib.*

4. The sureties of an administrator upon his official bond cannot be sued in equity by a judgment creditor for a *devastavit* committed by the administrator; the remedy of the creditor is by action at law upon the bond.

Buckingham v. *Owen*, 502.

DISCONTINUANCE.

Where the payee of a joint note, the makers of which reside in different counties, sues them all in a joint action in a county where one of them lives, and by writs to the different counties brings them all before the court of the county where the suit is instituted; and the maker residing in that county pleads to the action while the others make default, the holder of the note may discontinue his suit as to that maker, and may take judgment by default final against the others. *Read* v. *Renaud*, 79.

DISTRIBUTEES.

1. Where an administrator has left the state with the property of his intestate, can the distributees of the estate proceed by publication to make such absent administrator a party to a proceeding in the probate court by bill, for an account of his indebtedness to the estate, and to have his bond put in suit against the sureties? *Quære? Washburn* v. *Phillips*, 425.

2. Where a judgment has been obtained against the administrators of a deceased person, and they without paying the judgment, proceed to distribute the deceased's property among his legal distributees until it is all divided, the judgment creditor may levy his execution on any of the property thus distributed; and that too though the judgment should be assigned, and at the time of the levy belong to one of the distributees.

Vanhouten v. *Reiley*, 440.

DOWER.

1. J. W. filed her petition for dower in the lands of her alleged husband G. W.; J. S., the grantee of her husband, contested her right of dower, on the ground that she was not the wife of G. W. On the trial of the petition it was proved that J. W. was married to G. W. in 1814, and that in 1815, M. F., who had been married in 1809 to G. W., was alive. G. W. and J. W. after their intermarriage lived together as man and wife for twenty-five years, until the death of G. W.: *Held*, that the wife of G. W. being alive when he married J. W., the latter marriage was absolutely null and J. W. not his wife, and therefore not entitled to dower in his lands.

Smart v. *Whaley*, 308.

2. The representatives of the deceased husband are the only proper parties to a proceeding by the widow to be endowed of her husband's reality.

James v. *Rowan*, 393.

Digitized by Google

3. On proof of marriage, seizin of the husband during the coverture, non alienation on the part of the wife, and the death of the husband, she is against the representatives of the husband entitled to dower in his realty. *Ib.*

4. The rights of third parties are in nowise affected by a decree of the probate court, allotting dower to the widow in her deceased husband's realty; those who have such rights may put the widow to her ejectment or other appropriate remedy; and in such proceeding the respective claims will be considered in a great degree as if no decree of the probate court had been pronounced. *Ib.*

5. When third persons are made parties to a widow's application for dower in her deceased husband's realty, in the probate court, and contest her right, the consent of the parties thereto will not give that court jurisdiction of the subject-matter, and the rights of the parties thus illegally before the court, will remain the same as if no decision had been made affecting them. *Ib.*

6. Where a deed was made to J. and his sister, conveying a tract of land to them jointly; on the application of the widow of J. for dower in the land thus conveyed, his sister being in possession; *held*, that the legal title in J. by the deed in the absence of proof of an ouster, or that the possession of the sister was adverse, entitled his widow to dower, as against his representatives, in the land; nor could the probate court enter upon the inquiry as to whether J. was a trustee for his sister who had paid the purchase-money for the land; that inquiry and any other affecting his sister's title to the land, or the rights of other persons may be presented when the widow attempts to enforce her allotment of dower. *Ib.*

7. It is not competent for the probate court to adjudicate on conflicting rights in proceedings for dower; the parties contesting the right must be left to their appropriate legal remedies after an allotment has been made. *Ware* v. *Washington*, 737.

8. In an application for dower the widow must establish the seizin of her husband either actual or constructive, at some period during the coverture, before her dower can be allotted to her. *Ib.*

9. A widow is not entitled to dower in lands which her husband held only by virtue of a lease for ninety-nine years; such lease vested but a chattel interest in the husband, out of which the widow is not dowable. *Ib.*

DURESS.

1. A plea to an action on a note that the note was obtained by duress, setting forth in a detail of circumstances the nature of the duress in the procurement of the note, is not by such detail, even if unnecessary, vitiated. *Bingham* v. *Sessions*, 13.

2. A plea to an action on a note that the note was given to obtain the release of certain property levied on by virtue of a certain execution which was fraudulently issued on a judgment previously satisfied, under which execu-

Digitized by Google

tion the plaintiff threatened to sell the property thus levied on; *held* to be bad on demurrer. *Ib.*

3. A note given to obtain the release of property from an illegal levy is not void; the maker has his redress by action against the judgment creditor or the option to give the note; if he elect the latter he is bound by it. *Ib.*

4. A plea to an action on a note that the note was obtained by duress, through the fraudulent levy of an execution by the plaintiff therein, though bad as a plea of duress, should be so amended by the permission of the court, as to allow the defence arising out of the fraud of the plaintiff to be made. *Ib.*

EJECTMENT.

1. In an action of ejectment, in which the lessor of the plaintiff claims through a purchase at sheriff's sale, a certified copy of the judgment and a certified copy of the *venditioni exponas* under which the land was sold, are the only parts of the record that need be introduced to uphold the sheriff's deed. *Carson* v. *Huntington*, 111.

2. Where there has been a defective return upon process, it is a question of error or not in the rendering of the decree, and that decree cannot on account of such defective return, be attacked collaterally in an action of ejectment against parties claiming under the decree. *Doe* v. *Bradley*, 485.

EMANCIPATION.

L. died in 1836 in this state, and by his will directed his slaves *to be set free and sent to Indiana or Liberia as they might prefer;* he directed also the sale of his property, and part of the proceeds to be paid to the slaves thus liberated: *Held*, that the will was valid, and the executor could proceed in its execution; and that the bequest of property to the slaves was not void for want of capacity in them to take; if they do not comply with the terms of the will the bequest is void; if they do it is valid. *Leech* v. *Cooley*, 93.

ERROR.

1. In a suit in chancery against both adult and infant defendants, a decree rendered in favor of the complainants against all the defendants, upon *pro confesso* against the adult defendants, and the answer of guardians *ad litem* for the infants, without any proof, will be erroneous as to the infants, even though time be reserved in the decree to the infants after they come of age to show cause against it. *Hargrove* v. *Martin*, 61.

2. However defective a plea may be in form, if it be appropriate to the form of action, and go to the substance of it, it will be error to strike it out or reject it. *Smith* v. *The Commercial Bank of Rodney*, 83.

3. It is error for the circuit court, after several pleas have been filed, two verdicts rendered, and new trials granted, on motion, to set aside the service of the writ in the case and give a final judgment for the defendant. *Wooten* v. *Wingate*, 271.

Digitized by Google

4. Where a case has been submitted to a jury, and they have retired to consider of their verdict, it will be error for the court, without the consent of the parties, to explain, at the request of the jury, a matter of law to them, bearing upon the case, upon which they notified him they had doubts.

Taylor v. *Manley*, 305.

ESTATES OF DECEDENTS.

1. C. & H. filed a petition in the probate court against W. C., alleging that W. C. and themselves were jointly administrators *ad colligendum* on the estate of S. C., and that W. C. had in his possession property of the estate, which he claimed as his own, and refused to allow it to be inventoried, and prayed that he might be required to inventory it; W. C. filed a plea to the jurisdiction of the probate court: *Held*, that the probate court should entertain jurisdiction of the petition; and W. C. might have an issue to the circuit court for the investigation of his claim to the property in his possession.

Compton v. *Compton*, 194.

2. *Aliter*, if W. C. had been a stranger to the administration. *Ib.*

3. An executor or administrator is not bound to pay the debts of his decedent beyond the assets which he receives; nor will his written promise to do so, make him liable, unless founded on other sufficient consideration.

Byrd v. *Holloway*, 199.

4. B. and J. B. being sued by H. upon their joint note, offered to prove that the note was given in satisfaction of a decree of the probate court against B., as administrator of P., who in his lifetime was administrator of N. P.; in favor of H. as administrator *de bonis non* of N. P., which evidence the court refused to admit: *Held*, that the evidence was admissible, and if the note were executed in settlement of that decree, B. and J. B. were not liable on it unless B. had assets sufficient for its payment. *Ib.*

5. If the probate court, during the lifetime of a wife who is a distributee of an estate, decree the wife's distributive portion to be paid to the husband on his sole petition, and the wife die before the money is paid to the husband, the death of the wife will not affect the right of the husband to such distributive portion. *Henderson* v. *Guyot*, 209.

6. If an executor, against whom, as such, various judgments have been obtained, use the assets of the estate of his testator in the payment of the junior judgments against him as such executor, leaving the oldest judgment unpaid, he will be guilty of a *devastavit*, and will be liable to a proceeding against him by *scire facias*, as such executor, to subject him to the payment *de bonis propriis* of the judgment recovered against him as executor, and thus left unpaid. *Black* v. *Barton*, 239.

7. In such case the *scire facias* should state what amount of assets had come to the hands of the executor, as he would not be liable beyond that sum.

Ib.

8. The executor may plead to such *scire facias*, notwithstanding the former

Digitized by Google

judgment against him *plene administravit;* and will be discharged if he can shew a full and proper administration of the estate; such plea will not however be supported if there has been a misapplication of assets. *Ib.*

9. A sale by order of the probate court of the real estate of a decedent, must be made in strict compliance with the law, by issuing citation and advertising, or it will be void, and the records of the proceedings may be offered to show that the rules of law in those respects have not been strictly observed.

Laughman v. *Thompson*, 259.

10. It must appear, from the records of the probate court, in cases of the sale of lands by an administrator under its order, that legal notice has been given to the heirs at law, or a legal reason in excuse of the want of such notice, or both the order and the sale are void. *Ib.*

11. In the absence of the record of the proceedings of the probate court touching the sale of a decedent's realty, the action of that court will be presumed to have been correct; when the record, however, is produced, it must show affirmatively that everything necessary to give the court jurisdiction was performed. *Ib.*

12. If an administrator, upon the settlement of his accounts, is indebted to the estate of his intestate, the creditors or distributees may sue for the balance, the administrator *de bonis non* cannot. *Byrd* v. *Holloway*, 323.

13. Where a judgment has been obtained against the administrators of a deceased person, and they, without paying the judgment, proceed to distribute the deceased's property among his legal distributees, until it is all divided, the judgment creditor may levy his execution on any of the property thus distributed; and that too though the judgment should be assigned, and at the time of the levy belong to one of the distributees.

Vanhouten v. *Reiley*, 440.

14. The statute (H. & H. 395,) gives the widow of an intestate the preference of administering upon his estate; nor will that preference be taken away by the fact of her having once administered on the estate, and then renounced her administration; and of her claiming causes of action against the estate which were denied by the heirs. *Pendleton* v. *Pendleton*, 448.

15. By the statute the widow is entitled to take out letters of administration on her husband's estate, in preference to the son of the deceased.

Muirhead v. *Muirhead*, 451.

16. M. died Nov. 28, 1844; and at the December term, 1844, of the probate court, his son applied for, and obtained letters of administration upon his estate; at the January term, 1845, and within sixty days from the death of her husband, the widow of M. applied for letters of administration, and for the removal of the son: *Held*, that the widow's application should be granted. *Ib.*

17. Where the widow of an intestate told his son, in conversation, that she waived her right of administering on her husband's estate, and told him to take out letters, which he did; *held*, that these declarations not made in

Digitized by Google

court, would not preclude the widow from changing her mind at any time within the period allotted by law, and asserting her right to the grant of administration to herself. *Ib.*

18. The widow of an intestate, applying to administer on her deceased husband's estate, read the decree of a court divorcing the deceased from a former wife; this was excepted to by the party contesting her right to the administration: *Held*, that if the admission of the decree were erroneous it would not operate to the benefit or injury of either party, as her husband's right to marry was not questioned; and it could not therefore defeat the widow's right. *Ib.*

19. O., in February 1840, obtained judgment at law against G. & B. S., as administrators of M. S., deceased; in July 1839, G. & B. S. had resigned their letters of administration, and J. R. G. been appointed administrator *de bonis non* of M. S., and was in that office when judgment in favor of O. was rendered: *Held*, that the judgment in favor of O. thus obtained was neither binding upon the estate, nor upon J. R. G. the administrator, and was a nullity. *Buckingham* v. *Owen*, 502.

20. The sureties of an administrator upon his official bond cannot be sued in equity by a judgment creditor, for a *devastavit* committed by the administrator; the remedy of the creditor is by action at law upon the bond. *Ib.*

21. G. & B. S. administered upon the estate of M. S., when O. obtained judgment at law against them as such administrator; G. & B. S. resigned their office, and J. R. G. was appointed administrator *de bonis non*, took possession of the estate, used and wasted the assets, and died insolvent, and without personal representatives; D. was appointed administrator *de bonis non* of M. S., and represented the estate insolvent; whereupon O. filed his bill in chancery, against the sureties of J. R. G. on his bond, to compel them to pay his judgment: *Held*, that a court of chancery had no jurisdiction of the bill. *Ib.*

EVIDENCE.

1. Where a defence is based upon the provisions of a statute of another state, the statute, in order to make the defence available, must be produced and proved. *Hemphill* v. *Bank of Alabama*, 44.

2. Whether the certificate of the record of a deed made by a deputy of the probate clerk, in his own name, and not in that of his principal, is a valid certificate. *Quære?* *Hundley* v. *Buckner*, 70.

3. Where a deed was read without objection in the court below, the certificate of record of which was made by the deputy of the probate clerk, this court would not lend a willing ear to that objection raised here for the first time *Ib.*

4. Where a deed was offered in evidence, the certificate of the record of which was made and dated several years after the actual record of the

Digitized by Google

deed, such certificate, unless there be evidence to disprove it, will be sufficient evidence of the proper record of the deed to admit it as testimony. *Ib.*

5. The rule that if personal property be left in the possession of the grantor or vendor, it is evidence of fraud, has no application to deeds of trusts or mortgages duly recorded; it is confined to absolute sales; the recording of the mortgage is equivalent to an actual delivery of the property. *Ib.*
6. Where a trustee, to whom a slave has been conveyed as security for a debt, instituted an action of detinue against a person not a party to the deed, for the recovery of such slave, the recital in the deed of trust and the production of the note to secure which the negro was conveyed, will be *prima facie* evidence, of the *bona fides* of the debt thus secured. *Ib.*
7. Where the declaration against the indorser of a promissory note in its first count was in the usual form, but in the second did not aver demand and notice to the indorser, but, as excuse for the omission, averred that the maker of the note was insolvent; and the defendant plead non assumpsit, and a verdict, without any charge from the court, on proof of the insolvency, was rendered for the plaintiff; and the defendant moved for a new trial, which being refused he embodied the testimony in a bill of exceptions, and brought the case to this court: *Held*, that the statute of jeofails did not preclude this court from examining the case, and granting a new trial for want of sufficient evidence to uphold the verdict. *Reaves* v. *Dennis*, 89.
8. In an action of ejectment in which the lessor of the plaintiff, claims through a purchase at sheriff's sale, a certified copy of the judgment, and a certified copy of the *venditioni exponas* under which the land was sold, are the only parts of the record that need be introduced to uphold the sheriff's deed. *Carson* v. *Huntington*, 111.
9. In action against the sheriff, by the publisher of a newspaper, to recover of him the cost of his advertisements of sheriff's sale; the advertisement of such sales, though signed by the deputy sheriff, will be evidence against the sheriff. *Terral* v. *McRay*, 136.
10. Where in an action by a bank to recover the amount of a note payable to itself, the defendant proved that he had delivered to his counsel, to use in evidence, the receipt of the bank, for a certain amount of cotton, and that the receipt had been lost; and offered to prove the contents of the receipt; *held*, that a sufficient foundation for the secondary evidence had been laid and it should be admitted. *Smith* v. *Mississippi and Alabama Railroad Company*, 179.
11. Where a party has executed his note and afterwards delivers cotton to the payee in part payment thereof, and takes the payee's receipt therefor, upon the loss of such receipt, the maker, when sued upon the note, may prove the delivery of the cotton in payment of his debt by any other proof in his power, without producing or accounting for the receipt. *Ib.*
12. In an action against the indorser of a note, the notary's deposition was read

Digitized by Google

by the plaintiff to prove the protest and notice; and the defendant read another deposition taken a year previous, of the same notary, about the same note, in which deposition he differed in his statements from those in the other, about the mode of giving notice; when the plaintiff proved, that when the first deposition was given, the notary's books were lost, and the notary testified from recollection; when the second was taken they were found, and the notary had refreshed his memory from them. The defendant, by way of rebutting this proof, then offered to prove the notary's general habit in keeping his notarial record, and that he was in the habit of leaving his memoranda of notices of protest partly in blank, to be filled up afterwards. The court below rejected the testimony thus offered in rebuttal: *Held*, that it was competent, and should have been received.

Seltzer v. *Fuller*, 185.

13. It is erroneous to exclude evidence that the nominal plaintiff died before the suit was instituted; for if it is shown to the satisfaction of the court that the nominal plaintiff was dead at the time the suit was commenced, the effect must be an abatement of the suit. *Humphreys* v. *Irvine*, 205.

14 If the husband sue alone for his wife's distributive portion in an estate, and it do not appear by proof that the right of the wife accrued before coverture, and the probate court decree in favor of the husband, the presumption will be in favor of the correctness of the decision of that court.

Henderson v. *Guyot*, 209.

15. Where partners, when sued, seek to establish the existence of the partnership, they must produce the letters of partnership, or give a legal excuse for their non production, before the partnership can be proved by other evidence. *Bonnaffe* v. *Fenner*, 212.

16. In a proceeding against a bank by information in the nature of a *quo warranto*, the acts of the cashier, when proved, will be *prima facie* binding on the bank when performed in the discharge of the ordinary duties which belong to that officer; and in order to avoid such acts of the cashier, it devolves upon the corporation to show a special restriction imposed upon the cashier by the directors.

The State v. *The Commercial Bank of Manchester*, 218.

17. Where a bill of exceptions is taken in the admission of a deposition, on the ground that it was a deposition not taken in the pending suit, but in another suit between the same parties, and the deposition is not inserted in the bill of exceptions, the court will not disturb the verdict.

Wright v. *Bank of Alabama*, 251.

18. It is competent, for the maker of a note given for lands bought at an administrator's sale, to show, by the record of the proceedings of the probate court appertaining to the sale, that the sale was not made according to the directions of the statute, and thus establish a failure of consideration of the note. *Laughman* v. *Thompson*, 259.

19. A sale, by order of the probate court, of the real estate of a decedent,

Digitized by Google

must be made in strict compliance with the law, by issuing citation and advertising, or it will be void, and the records of the proceedings may be offered to show that the rules of law in those respects have not been strictly observed. *Ib.*

20. If a plea of *nul tiel corporation*, supported by affidavit, be filed to a declaration by a bank on a note, and issue be joined thereon, and the bank introduce in evidence a copy of the act of its incorporation, with proof of user under the charter, it is sufficient to entitle it to recover.

Henderson v. *Mississippi Union Bank*, 314.

21. In an action by a physician to recover fees due him, it is not necessary that all the items of his account should be proved: where, however, the proof of the various items is not clearly made out, the physician would strengthen his proof by showing that he kept correct books and that the account was correctly copied from his books. *Hazlip* v. *Leggett*, 326.

22. L., a physician, sued the administrators of G. for medical services rendered, extending from 1836 to 1842, and proved by Dr. M. that he, (L.) had attended in the family of G. as physician during his (M's.) absence, who was G's. regular physician; that he knew nothing of the particular visits and prescriptions charged, but had seen L. two or three times at the house of G.; that he had heard G. in his lifetime frequently say that in the absence of witness he had employed L., and he had two or three times been called in consultation with L. at G's. house, over some of his sick family: *Held*, that the evidence was not sufficient to entitle L. to recover on the account. *Ib.*

23. Where articles of partnership with reference to land are lost, parol evidence of their contents is admissible. *Perry* v. *Randolph*, 335.

24. In an action by P. against D. & R. as the owners, in partnership, of a race-course, for work done on the course, R. denied, under oath, the partnership; and, after proof of a written agreement between D. & R. for the construction of the course, at joint expense and profit, P. offered to prove that, though he was employed by D. to do the work, yet that R. was often present, giving orders and directions concerning it, and shared the profits of the course, after it was completed: *Held*, that the proof was admissible, as tending to establish the partnership in the race-course between D. & R., and their joint liability as partners, for the work done. *Ib.*

25 D. & R. being partners in a race-course, D. sold out his interest to G., who assumed to pay D.'s share of the debts due on account of the course; in an action against D. & R. by P. for work done on the course, *held*, that G. was a competent witness to prove payment by D. to P. for the work done by P., and for the value of which he was suing. *Ib.*

26. The administrators of a deceased person, at the sale of his personal property, proclaimed that the slaves about to be sold were subject to judgment liens, and offered and agreed that in case they should be seized under the judgments, the sale should be considered as void, and the notes of the pur-

Digitized by Google

chasers be given up; the slaves accordingly sold for their full value; in an action brought by the administrators on a note given for the purchase-money, *held*, that the makers of the note might show, under the general issue, that the slaves, for the price of which the note was given, were taken out of their possession and sold by judgments against the estate, and that the consideration of the note had thus failed.

Buckles v. *Cunningham*, 358.

27. The rule of law that parol evidence cannot be heard to vary written agreements, has never been carried so far as to defeat the right to prove a failure of consideration. *Ib.*

28. C. being sued upon three notes made by an agent, plead non assumpsit with an affidavit of its truth, and that the notes were not made by him. The plaintiff on the trial read a power of attorney from C. to the agent, authorizing him to purchase goods for C. to keep up a mercantile establishment owned by C., either for cash or on a credit, and to execute the notes of C. for that purpose. After the introduction of the power of Attorney, the plaintiff, without other proof of the execution of the notes sued on, read them *without objection* on the part of the defendant, to the jury: *Held*, that by permitting the notes to be thus read without objection the defendant waived further proof of their due execution, and could not, on motion for a new trial, or in this court object to a verdict against him on the ground that the notes had been improperly admitted in evidence. *Carter* v. *Taylor*, 367.

29. It is requisite, before a principal can be held bound by the acts of his limited agent, not only to prove the agency but also to prove that the act was done within the scope of that limited agency; thus where in an action against the principal on a note made by his agent, it is proved that agent was authorized to execute the notes of his principal in the purchase of goods for the store of the principal, it must also be proved before the principal will be liable, that the notes were actually executed in the purchase of such goods. *Ib.*

30. And if, in an action on such notes, the defendant, on proof of the execution of the power of attorney, permit the notes, without objection, to be read in evidence to the jury, it will be a tacit admission on his part that the notes were duly executed by the agent in the proper purchase of merchandise, and he will not be heard on a motion for a new trial, or in this court, objecting that such proof was not made, and that the notes were therefore inadmissible in evidence. *Ib.*

31. He who wishes to avail himself of a contract containing conditions precedent on his part to be performed, in pleading must plead performance of those conditions precedent, and in making proof must prove performance of them. *Fultz* v. *House*, 404.

32. A commission which issues from the office of the circuit clerk, for the purpose of taking a deposition, which does not contain the name of any com-

Digitized by Google

missioner at the time it issues from the clerk's office, will be irregular, and the deposition taken under it must be excluded. *Rupert* v. *Grant*, 433.

33. Where a deposition has been excluded from the jury, on the ground that the commission under which it was taken was irregular, in not having the name of the commissioner in it when it issued, the party who took the deposition cannot obtain a new trial on the ground of surprise in the exclusion of the deposition, as that exclusion was owing to his own laches in irregularly suing out the commission. *Ib.*

34. The Commercial Bank of Manchester lent to C. & M. $12,000, for which they were to ship cotton to the merchants of the bank, to be shipped to Liverpool and sold for account of C. & M.; and the proceeds to be credited on the note of C. & M. for the sum lent; C. & M. shipped 200 bales of cotton which were sent to Liverpool, and for which the bank credited C. & M.'s note with $6,711 39 as the proceeds of sale; C. & M. not being satisfied with the credit thus given, it was *held*, that they had a right to show, by way of increasing the amount of offset, the quality of the crop of cotton of that year, the usual weight of the bales, and the average price at Liverpool about the time the sale took place.

The Commercial Bank of Manchester v. *Chisholm*, 457.

35. In such case the account of sales rendered by the English house (to which the cotton was shipped,) to the bank, would not be evidence in itself; the deposition of some acquainted with the transaction would be requisite to establish its truth. *Ib.*

36. Nor in such case would the defendant be authorized to show that the notes of the bank, at and near the time of the maturity of the note, were at a discount in New Orleans, by way of increasing the amount of set-off; if any such inquiry be instituted into the value of the money loaned, it must be confined to the time of the loan, and the place where it occurred. *Ib.*

37. In an action of trover for a note payable to bearer, the possession by the defendant of the note will be *prima facie* evidence of his ownership, which will not be rebutted by proof that the note formerly belonged to the plaintiff.

Smith v. *Prestidge*, 478.

38. It seems it would be otherwise if the note were payable to order, and not indorsed. *Ib.*

39. Where a holder sues on a note and his title is properly questioned, he must make out his title; but when the holder is sued for a note payable to bearer, his possession will be a sufficient protection, until a better title is shown. *Ib.*

40. Where a bill was filed by J. against the state, to recover the amount of an alleged indebtedness, to which the state, by her officer, answered that the legislature had by law authorized the governor, the auditor, and commissioner of public buildings to examine J.'s accounts, and make him such allowance as they might find him entitled to; and that they had examined J.'s accounts,

Digitized by Google

and found that there was nothing due him; *held*, that the answer of the state, setting up this matter in avoidance of the bill, must be established by strict proof; and the certificate of these officers to the effect set up in the answer, but which did not state that J. submitted his accounts to them for examination, or was present when his accounts were exhibited, will not be sufficient evidence to maintain the answer. *Jack* v. *The State*, 494.

41. If a claim be placed in the hands of two attorneys practising in partnership, and before any steps are taken in the collection of the claim, the firm dissolve, and one of the members take charge of the claim, and render all the services in its collection, and sue individually the owner of the claim for his fees for so doing, the jury will be justified in inferring that it was part of the contract of dissolution between the partners, that the one who has rendered the services should attend to the claim and receive the compensation, and their verdict to that effect will be upheld.

Anderson v. *Tarpley*, 507.

42. Where, in an action upon an open account for attorney's fees, the jury render a verdict for the plaintiff; and at the trial the defendant offered a deposition, proving part payment of the account sued on, which was rejected improperly by the court below; *held*, that the judgment below should be reversed; but upon the plaintiff's below entering a *remittitur* in this court of the amount proved by the deposition to have been paid, with interest up to the rendition of the verdict below, this court will render a judgment for the balance. *Ib.*

43. Where a bond was payable on its face to B., it seems it is a matter of doubt whether it would be admissible in a court of law to prove that the obligation did not originally belong to B. but to a bank.

Lanier v. *Trigg*, 641.

44. Fraud may sometimes be established by strong circumstantial evidence, even against positive proof denying it. *Petrie* v. *Wright*, 647.

45. Where a complainant, in addition to the general allegations in his bill, propounds special interrogatories to the defendant, the direct answers of the defendant to such interrogatories, are evidence for as well as against him, and will be conclusive unless shown to be false; nor will any presumption be indulged against such evidence, on account of its being furnished by a party interested. *Ib.*

46. No tribunal has authority to take proof except in a case before it, or by authority expressly conferred by a commission, or by statute.

Merrill v. *Bell*, 730.

47. Depositions taken in one suit are not admissible as evidence in another, unless both suits are between the same parties, or those who are privies in blood, in estate, or in law. *Ib.*

48. B. deposited $ 1235 with M. in trust, to be returned whenever, within two years thereafter, B. would make, before any tribunal having competent jurisdiction therein, good and sufficient proof, satisfactory to the admin-

Digitized by Google

istrator of E., of the payment by B. on the 15th day of May, 1837, to E. or his duly authorized agent, of the sum of $950, to apply on certain payments to be made by B. to L. in pursuance of certain articles of agreement made and entered into by B. and L., dated January 5th, 1837, whether the same shall appear to have been paid by a note or notes, or in cash: *Held*, in an action by B. against M. to recover back the $1235, that the conditions, so far as they relate to the manner of making the proof and its sufficiency, are inoperative, and B. was entitled to recover if he could prove the payment of the $950 to E., or the duly authorized agent of L., without having made any preliminary proof to a tribunal or to E.'s administrator. *Ib.*

49. In an action by B. against M. to recover $1235, deposited by B. with M. to be returned when B. should prove that he paid E. or his authorized agent the sum of $950, to apply on certain payments to be made by B. to L. in pursuance of certain articles of agreement made and entered into by B. and L.; B., in order to prove the payment of the $950 to E. as agent of L. introduced and read to the jury, certain depositions which had been taken in a controversy pending in the probate court between L. and E.'s administrator to recover money paid by B. to E. for L.: *Held* that the depositions having been taken in a case to which B. was not a party, and M. only a party as the agent of L., were inadmissible to prove the payment in the suit between B. and M. *Ib.*

EXECUTION.

1. A plea to an action on a note, that the note was given to obtain the release of certain property levied on by virtue of a certain execution, which was fraudulently issued on a judgment previously satisfied, under which execution the plaintiff threatened to sell the property thus levied on; *held*, to be bad on demurrer. *Bingham* v. *Sessions*, 13.

2. A note given to obtain the release of property from an illegal levy, is not void; the maker has his redress by action against the judgment creditor, or the option to give the note; if he elect the latter, he is bound by it. *Ib.*

3. A plea to an action on a note that the note was obtained by duress, through the fraudulent levy of an execution by the plaintiff therein; though bad as a plea of duress, should be so amended by the permission of the court, as to allow the defence arising out of the fraud of the plaintiff to be made. *Ib.*

4. Where a vendee who has taken from his vendor a bond for title when the purchase-money is paid, has, on the payment of all the purchase-money, such an interest in the premises purchased, as is liable to seizure and sale under execution of *fieri facias* at law. *Moody* v. *Farr*, 100.

5. Where the assignee of one of a series of notes all secured by mortgage, sues the debtor at law and arrests him upon *mesne* process, and afterward, from the inability of the debtor to give bail, and out of clemency discharge him from the arrest, the mortgage lien of such assigned note will not thereby be divested or taken away. *Terry* v. *Woods*, 139.

Digitized by Google

6. It seems it would be otherwise if the discharge were upon an arrest or final process. *Ib.*

7. Where an execution on a younger judgment was levied in December, 1840, on personal property which was advertised for sale on the 4th day of January, 1841, under that levy; and on the day of sale, an execution on an older judgment was levied on the property under sale by virtue of the first levy; the judgment first levied, and under which the sale takes place, though junior in date, will be entitled to the proceeds of the sale; but the purchaser of the property will hold it subject to the lien of the older judgment. *Calmes* v *Ford*, 190.

8. Where money is levied upon several executions, that is entitled to be first satisfied which issued upon the oldest judgment. *Jennings* v. *Dennis*, 379.

9. J. being a judgment creditor of V., sued out his execution of *fieri facias*; subsequently D., also a judgment creditor of V., whose judgment was three days the elder, issued his execution likewise; the executions were both levied on the same day on two slaves, the property of V. Before the levy, J. gave an indemnifying bond; two days after the levy, D. gave a similar bond; soon after, and before the executions on which these levies had been made had been otherwise acted on, D. sued out an alias *fieri facias* to another county, and had it levied on another slave, the property of V.; afterwards D., finding the first levy sufficient, and relying on it for his debt, released the second levy. On motion for the appropriation of the money made by the sale of the two slaves first levied on, *held* that D.'s judgment being the eldest, and nothing having been done to lose its lien, was entitled to the money. *Ib.*

10. Where a judgment has been obtained against the administrators of a deceased person, and they, without paying the judgment, proceed to distribute the deceased's property among his legal distributees until it is all divided, the judgment creditor may levy his execution on any of the property thus distributed; and that too though the judgment should be assigned, and at the time of the levy belong to one of the distributees.

Vanhouten v. *Reily*, 440.

11. In such case, though there might be equities among the several distributees as to the proportion in which they shall contribute to the payment of the claim, those equities cannot be settled in a court of law on a motion to quash the execution. *Ib.*

EXECUTORS AND ADMINISTRATORS.

1. L. sued S. & H. and P. & M. upon a joint note; M. died during the progress of the suit and before judgment; whereupon L. having brought the administrators of M. before the court by *sci. fa.* dismissed the suit as against the other parties, and took judgment against the administrators of M. *Held*, that the proceedings were regular and proper. *Woodhouse* v. *Lee*, 161.

2. Where a party defendant who has pleaded to the action, dies during the progress of the suit, and his administrators are brought in by *scire facias*,

Digitized by Google

the plea filed during the lifetime of the intestate, will be the plea of the administrators, if they omit to file a plea to the *scire facias*. *Ib.*

3. C and H. filed a petition in the probate court against W. C., alleging that W. C. and themselves were jointly administrators *ad colligendum* on the estate of S. C. and that W. C. had in his possession property of the estate which he claimed as his own, and refused to allow it to be inventoried; and prayed that he might be required to inventory it; W. C. filed a plea to the jurisdiction of the probate court: *Held*, that the probate court should entertain jurisdiction of the petition; and W. C. might have an issue to the circuit court for the investigation of his claim to the property in his possession. *Compton* v. *Compton*, 194.
4. *Aliter*, if W. C. had been a stranger to the administration. *Ib.*
5. An executor or administrator is not bound to pay the debts of his decedent, beyond the assets which he receives; nor will his written promise to do so make him liable, unless founded on other sufficient consideration. *Byrd* v. *Holloway*, 199.
6. B. and J. B., being sued by H. upon their joint note, offered to prove that the note was given in satisfaction of a decree of the probate court against B., as administrator of P., who in his lifetime was administrator of N. P.; in favor of H., as administrator *de bonis non* of N. P.; which evidence the court refused to admit: *Held*, that the evidence was admissible; and if the note were executed in settlement of that decree, B. and J. B. were not liable on it, unless B. had assets sufficient for its payment. *Ib.*
7. If an executor against whom as such various judgments have been obtained, use the assets of the estate of his testator in the payment of the junior judgments against him, as such executor, leaving the eldest judgment unpaid, he will be guilty of a *devastavit*, and will be liable to a proceeding against him by *scire facias*, as such executor, to subject him to the payment *de bonis propriis* of the judgment recovered against him as executor and thus left unpaid. *Black* v. *Barton*, 239.
8. In such case the *scire facias* should state what amount of assets had come to the hands of the executor, as he would not be liable beyond that sum. *Ib.*
9. The executor may plead to such *scire facias* notwithstanding the former judgment against him *plene administravit;* and will be discharged if he can show a full and proper administration of the estate; such plea will not however be supported if there has been a misapplication of assets. *Ib.*
10. An administrator *de bonis non* can maintain a suit only for those articles which remain unadministered. *Byrd* v. *Holloway*, 323.
11. If an administrator, upon the settlement of his accounts, is indebted to the estate of his intestate, the creditors or distributees may sue for the balance, the administrator *de bonis non* cannot. *Ib.*
12. The administrators of a deceased person at the sale of his personal property, proclaimed that the slaves about to be sold, were subject to

Digitized by Google

judgment liens, and offered and agreed that in case they should be seized under the judgments, the sale should be considered as void and the notes of the purchasers be given up; the slaves accordingly sold for their full value; in an action brought by the administrators on a note given for the purchase-money, *held*, that the makers of the note might show, under the general issue, that the slaves, for the price of which the note was given, were taken out of their possession and sold by judgments against the estate, and that the consideration of the note had thus failed.

Buckles v. *Cunningham*, 358.

13. A suit upon an administrator's bond cannot be maintained in the probate court. The remedy thereon is at law. *Washburn* v. *Phillips*, 425.

14. The application to the probate court to have an administrator's bond declared forfeited and for leave to put in suit, is intended by the statute to be *ex parte* in its character; and the sureties on the bond have no right to contest their liability in that stage of the proceeding. *Ib.*

15. As a general rule the probate court should, on application, allow the administrator's bond to be put in suit; the instances are few in which the leave should be refused. *Ib.*

16. Where an administrator has left the state with the property of his intestate, can the distributees of the estate proceed by publication to make such absent administrator a party to a proceeding in the probate court by bill, for an account of his indebtedness to the estate, and to have his bond put in suit against the sureties? *Quære? Ib.*

17. Is not a bill in the probate court by the distributees of an estate against an administrator and his sureties on his official bond to have an account of what is due by the administrator taken, and to have his official bond declared forfeited and put in suit, liable to demurrer for multiplicity of parties? *Quære? Ib.*

18. In plenary proceedings by bill in the probate court against an administrator, it is premature to enter a decree without taking the bill for confessed. *Ib.*

19. Where a judgment has been obtained against the administrators of a deceased person, and they, without paying the judgment, proceed to distribute the deceased's property among his legal distributees until it is all divided, the judgment creditor may levy his execution on any of the property thus distributed; and that too though the judgment should be assigned, and at the time of the levy belong to one of the distributees.

Vanhouten v. *Reily*, 440.

20. The statute (H. & H. 295,) gives the widow of an intestate the preference of administering upon his estate; nor will that preference be taken away by the fact of her having once administered on the estate, and then renounced her administration; and of her claiming causes of action against the estate, which were denied by the heirs. *Pendleton* v. *Pendleton*, 448.

Digitized by Google

21. By the statute, the widow is entitled to take out letters of administration on her husband's estate in preference to the son of the deceased.

Muirhead v. *Muirhead*, 451.

22. M. died Nov. 28, 1844; and at the December term, 1844, of the probate court, his son applied for, and obtained letters of administration upon his estate; at the January term, 1845, and within sixty days from the death of her husband, the widow of M. applied for letters of administration, and for the removal of the son; *Held*, that the widow's application should be granted. *Ib.*

23. As a general rule when the probate court has conferred letters of administration, it cannot remove the incumbent, unless for some defined statutory cause. *Ib.*

24. Where the widow of the intestate has applied for letters of administration on her husband's estate, and his son by a former marriage has made a like application, an affidavit by the son for a continuance of the application on the ground of the absence of a witness who could prove that a short time previous to the widow's marriage to the intestate, she was living with another man as husband and wife, will not constitute a legal showing for a continuance; the affidavit should also state that the individual charged to have been the first husband of the widow was alive at the time of her intermarriage with the intestate. *Ib.*

25. Where the widow of an intestate told his son, in conversation, that she waived her right of administering on her husband's estate, and told him to takeout letters, which he did; *held*, that these declarations, not made in court, would not preclude the widow from changing her mind at any time within the period allotted by law, and asserting her right to the grant of administration to herself. *Ib.*

26. The widow of an intestate, applying to administer on her deceased husband's estate, read the decree of a court divorcing the deceased from a former wife; this was excepted to by the party contesting her right to the administration: *Held*, that if the admission of the decree were erroneous it would not operate to the benefit or injury of either party, as her husband's right to marry was not questioned and it could not therefore defeat the widow's right. *Ib.*

27. O., in February, 1840, obtained judgment at law against G. & B. S., as administrators of M. S., deceased; in July, 1839, G. & B. S. had resigned their letters of administration, and J. R. G. been appointed administrator *de bonis non* of M. S., and was in that office when judgment in favor of O. was rendered: *Held*, that the judgment in favor of O. thus obtained was neither binding upon the estate, nor upon J. R. G. the administrator, and was a nullity. *Buckingham* v. *Owen*, 502.

28. The sureties of an administrator upon his official bond cannot be sued in equity by a judgment creditor, for a *devastavit* committed by the administrator; the remedy of the creditor is by action at law upon the bond. *Ib.*

Digitized by Google

99. G. & B. S. administered upon the estate of M. S., when O. obtained judgment at law againt them as such administrator; G. & B. S. resigned their office, and J. R. G. was appointed administrator *de bonis non*, took possession of the estate, used and wasted the assets, and died insolvent, and without personal representatives; D. was appointed administrator *de bonis non* of M. S., and represented the estate insolvent: whereupon O. filed his bill in chancery, against the sureties of J. R. G. on his bond, to compel them to pay his judgment: *Held*, that a court of chancery had no jurisdiction of the bill. *Ib.*

FAILURE OF CONSIDERATION.

1. It is a general rule, that in an action for the price of a chattel, the vendee may prove, in defence, deceit on the part of the vendor, and that the article was of no value; or he may show a partial unsoundness, in mitigation of damages. *Harmon* v. *Sanderson*, 41.

2. A purchaser cannot, by his own act alone, return and revest the property in the seller, and recover the price paid, on the ground of a total failure of consideration, nor can he by the same means protect himself from the payment of the price on the same ground. *Ib.*

3. In an action for the price of a chattel, proof that the representations of the seller, at the time of the sale, were fraudulent, and the article of no value, will alone warrant a verdict for the defendant, however far the evidence may extend, in mitigation of damages. *Ib.*

4. B. & J. B. being sued by H. upon their joint note, offered to prove that the note was given in satisfaction of a decree of the probate court against B. as administrator of P. who in his lifetime was administrator of N. P., in favor of H. as administrator *de bonis non* of N. P., which evidence the court refused to admit: *Held*, that the evidence was admissible, and if the note were executed in settlement of that decree, B. & J. B. were not liable on it, unless B. had assets sufficient for its payment. *Byrd* v. *Holloway*, 199.

5. It is competent for the maker of a note given for lands bought at an administrator's sale, to show by the record of the proceedings of the probate court appertaining to the sale, that the sale was not made according to the directions of the statute, and thus establish a failure of consideration of the note. *Laughman* v. *Thompson*, 259.

6. Where a vendor of land, in his bond for title, describes the land as lying on a certain creek in the county, in certain sections, without giving the particular subdivisions of the sections, or the township and range in which the land lies; the description of the land will be sufficient to uphold the consideration of the notes given for the purchase-money; as the location on the particular creek removes the uncertainty as to the subdivisions and township. *Hazlip* v. *Noland*, 294.

7. Where a vendor of land has given a bond for title, without affixing any time in which it is to be made, and takes notes, payable at a fixed time, for

Digitized by Google

the purchase-money; and afterward, but before the notes are paid, executes a defective deed to the vendee, he will not thereby be deprived of his right to recover on the notes; as the execution of the defective deed does not absolve him from the obligation of his bond to make a good title; which the vendee may still demand. *Ib.*

8. Whether, where a vendee of land who has a bond for title from the vendor, dies before paying the purchase-money, and his administrators are sued therefor, the administrators can object to a deed from the vendor, made but not delivered before the vendee's death, for insufficiency or imperfection, so as to call in question the validity of the title to the land, by way of assailing the validity of the notes. *Quære? Ib.*

9. Whether, where a vendor who has given a bond for title recites in his deed conferring title that he grants, bargains, and sells the land, and in the conclusion of the deed warrants the title only against himself and heirs, he thereby limits the statutory warranty given to the words, grant, bargain, and sell. *Quære? Ib.*

10. A warranty does not pass title, but only secures an indemnity if there be incumbrances. A vendor of land who has given a bond to make title, it seems, therefore, may, under some circumstances, comply with his bond by giving a deed to the land, with special warranty. *Ib.*

11. Where, to an action on a bond, the defendant pleaded that the bond was given for the hire of a negro for a year, and the negro was taken out of the defendant's possession on a certain day, before the expiration of the hire, by the payee of the bond, to which the plaintiff replied in substance, that the contract of hire was that the plaintiff might at any time take possession of the negro by deducting twelve dollars per month for the unexpired time; and possession had been accordingly taken; to which replication the defendant demurred, and the court overruled the demurrer and gave judgment final against the defendant for the amount due upon the bond, after deducting the period of the negro's absence; *held*, that the judgment final was erroneous; the court should have awarded a judgment with a writ of inquiry. *Grover* v. *Gaunt*, 317.

12. To a declaration on a bond for the payment of money, the defendant plead that the bond was executed for the hire of a negro by the plaintiff to the defendant from January 1st, 1841, to January 1st, 1842, and that the negro, during that period, should not be removed from the defendant's possession; yet the plaintiff did, on the 3d day of May, 1841, take the negro out of the defendant's possession, by which the consideration of the writing obligatory had failed; the plaintiff replied, that when the negro was hired, it was agreed between the plaintiff and defendant, that if the plaintiff should want the negro before the first day of January, 1842, the defendant should give her up, deducting twelve dollars per month for the unexpired time; and that the defendant had the negro until the 3d day of June, 1841, *without this* that the plaintiff agreed that the negro should stay the whole year as

Digitized by Google

averred by the defendant: *Held*, on demurrer, that the plea was good in substance and form. *Ib.*

13. It is a general rule that if there be a mere failure of consideration arising from the sale of a defective legal title, unmingled with fraud or bad faith, the vendee will be left to the covenants and warranty in his deed.

Wilty v. *Hightower*, 345.

14. The administrators of a deceased person, at the sale of his personal property, proclaimed that the slaves about to be sold were subject to judgment liens, and offered and agreed that in case they should be seized under the judgments, the sale should be considered as void, and the notes of the purchasers be given up; the slaves accordingly sold for their full value; in an action brought by the administrators on a note given for the purchase-money, *held*, that the makers of the note might show, under the general issue, that the slaves, for the price of which the note was given, were taken out of their possession and sold by judgments against the estate, and that the consideration of the note had thus failed. *Buckles* v. *Cunningham*, 358.

15. The rule of law that parol evidence cannot be heard to vary written agreements has never been carried so far as to defeat the right to prove a failure of consideration. *Ib.*

FORFEITURE.

1. The right of the legislature to remit a penalty or forfeiture imposed by law, exists, and may be enforced without impairing the obligation of any contract to which the penalty or forfeiture may be attached.

Nevitt v. *Bank of Port Gibson*, 513.

2. A judgment of forfeiture against a bank under the act of 1843, has none of the common law consequences of a judgment of forfeiture; the legislature having waived its right to the common law penalties, by providing that concurrently with the judgment of forfeiture, the assets and property of the bank shall vest in trustees for the benefit of creditors of the bank. *Ib.*

3. The mere judgment of forfeiture does not *ipso facto*, work a dissolution of the corporation; there must be first execution for the seizure of the franchises before the penalties of forfeiture take place. *Ib.*

4. In a proceeding against a corporation, as such, for forfeiture of charter, the performance of conditions precedent to the existence of the corporation cannot be inquired into; its existence as a corporation is admitted by the proceedings against it. *Commercial Bank of Natchez* v. *The State*, 599.

5. The charter of the Commercial Bank of Natchez provided that no person, firm or corporation, should in the original subscriptions for stock, on any one day, subscribe directly or indirectly, or procure any other person to subscribe, with the understanding that it should be transferred after the books were closed, for more than fifty shares of stock; in a proceeding by *quo warranto* against the bank, it was alleged, as ground of forfeiture, that more than fifty shares had been subscribed for, in violation of that section of the char-

Digitized by Google

ter, and that the stock had been afterwards transferred: *Held*, that these subscriptions for stock being under the superintendence of eight commissioners named in the charter, and under their supervision, and before the bank had a corporate existence, the bank, as such, would not be held responsible for the violation of law of those commissioners who were the agents of the state. *Ib.*

6. It was provided in the charter of a bank, that "should any stockholder refuse or fail to pay any instalment on his stock when called for, the company shall sell said stock, on giving thirty days' notice in some gazette, on account of, and at the risk of the stockholder." *Held*, that failure on the part of the bank to comply with this provision, was not a cause of forfeiture of the charter of the bank; the authority to sell the stock was a mere cumulative remedy given to the corporation to enable it to coerce the payment of stock in a more speedy manner than by action at law. *Ib.*
7. A refusal by a bank, on proper application, to pay its notes, bills, bonds and other liabilities issued by the bank, in specie, is a cause of forfeiture of the charter of such bank. *Ib.*
8. The charter of a bank contained no provision which in so many words required the bank at all times to pay specie; by its charter the capital stock was to be paid in gold or silver, or the notes of specie-paying banks; and the bank was prohibited from issuing notes to a greater amount than three times the amount of the capital stock paid in; by another section of the charter it was provided that if the bank refused to pay its notes on demand, the holder might demand an interest of twelve and a half per cent. per annum on such notes, the payment of which had been refused. In a proceeding by *quo warranto* against the bank, it was alleged, as cause of forfeiture, that the bank, on the first day of November, 1841, and on divers other days before and since, did refuse, on demand being made at its counter in its banking house, during the regular hours for doing business, to redeem in specie or other lawful money of the United States, the notes, bills, bonds, and other liabilities issued by said bank, and then due: *Held*, on demurrer, that the cause of forfeiture was sufficiently pleaded, and the demurrer must be overruled. *Ib.*
9. In a proceeding against a bank for forfeiture of charter, alleging as cause of forfeiture, a suspension of specie payments, the answer of the bank that it paid all its notes and liabilities except certain checks which it had drawn on another bank, for payment of which provision had been made with that bank, but it failed to pay them, and they were returned; and on being returned, the bank which issued them was unable to take them up at the time, but in two years afterwards, and before the commencement of any proceedings against it, it resumed specie payment on those checks and all other liabilities, whenever payment was demanded at its counter, and was then paying specie, was *held* not to be a sufficient answer to the charge of forfeiture and no excuse for the suspension. *Ib.*

Digitized by Google

10. How far a mere temporary suspension of specie payments will work a forfeiture of charter, and what is a *temporary* suspension? *Quære? Ib.*
11. In the year 1840, a bank chartered previously, being in a state of suspension of specie payments, the legislature passed a law that all the banks in the state, by the 1st of April, 1840, should pay their fives in specie; by the 1st of July, their tens; by the 1st of October, their twentys, and by the 1st of January, 1841, their other notes and debts: *Held*, that this act was constitutional and valid; and a failure on the part of the bank to comply with the provisions of the law would work a forfeiture of its charter. *Ib.*

FORTHCOMING BOND.

1. Although, as a general rule, a writ of error cannot be prosecuted after the forfeiture of a forthcoming bond, yet, if that bond be made the subject of a motion and judgment, a writ of error may be granted to reverse that judgment, because it is a distinct and independent matter.
Puckett v. *Graves*, 384.
2. Where the record showed that, at the December term, 1842, of the circuit court, a motion was made to quash a forthcoming bond, which was taken under advisement, and not decided in four months, as required by the statute; and afterwards, at the December term, 1843, a like motion was made to quash the forthcoming bond, which was sustained, and the bond quashed: *Held*, although no forthcoming bond was embodied in the record by bill of exceptions, yet it sufficiently appeared that the motion to quash, which had been sustained, was not made at the return term of the forthcoming bond, and was therefore erroneously sustained. *Ib.*
3. Where a motion to quash a forthcoming bond is taken by the circuit judge, under advisement, and his decision not rendered in four months, as required by the statute, H. & H. Dig. 481, the motion will be considered as having expired with the term. *Ib.*
4. Every motion made in a cause constitutes part of its history, and is as much a part of the record as the declaration, plea, or judgment. *Ib.*

FRAUD.

1. A plea to an action on a note, that the note was obtained by duress, through the fraudulent levy of an execution by the plaintiff therein; though bad as a plea of duress, should be so amended by the permission of the court, as to allow the defence arising out of the fraud of the plaintiff to be made. *Bingham* v. *Sessions*, 13.
2. It is a general rule, that in an action for the price of a chattel, the vendee may prove in defence, deceit on the part of the vendor, and that the article was of no value; or he may show a partial unsoundness in mitigation of damages. *Harmon* v. *Sanderson*, 41.
3. The rule, that if personal property be left in the possession of the grantor or vendor, it is evidence of fraud, has no application to deeds of trust or

Digitized by Google

mortgages duly recorded; it is confined to absolute sales; the recording of the mortgage is equivalent to an actual delivery of the property.
Hundley v. *Buckner*, 70.

4. It is a general rule, that if there be a mere failure of consideration, arising from the sale of a defective legal title, unmingled with fraud or bad faith, the vendee will be left to the covenants and warranty in his deed.
Wilty v. *Hightower*, 345.

5. M. W. entered a tract of land, and in January, 1837, assigned the certificate of entry to D. In October, 1838, a judgment was rendered against M. W., under which the land was sold, and bought by H. in September, 1840, who sold by deed of warranty to W. in December, 1840, W. having in 1839 bought the same land from D. to whom a patent issued for it in December, 1841, and who conveyed it by deed to W. in 1844; W. filed a bill against H., alleging that H. misrepresented the nature of his title at the time of sale, and that he, W., had been evicted under a paramount title, and prayed a rescission of the contract of sale from H. to W. H. denied the misrepresentation, and there was no proof of eviction: *Held*, that the sale could not be rescinded, as the complainant had not made out a case of fraud or of plain and palpable mistake affecting the substance of the subject-matter of the contract; and that the bill must be dismissed without prejudice to W.'s remedies at law. *Ib.*

6. Fraud may sometimes be established by strong circumstantial evidence, even against positive proof denying it. *Petrie* v. *Wright*, 647.

7. A voluntary release of securities held by a corporation, is void as to creditors; yet if, in the settlement of mutual and conflicting claims, a corporation allow a debtor more than he is strictly entitled to, that is not of itself a fraud; there must be some device to injure others, or the act must be so grossly extravagant, and wasteful as to amount to a fraud in law. *Ib.*

8. P. contracted with the Mississippi and Alabama Railroad Company, to build a railroad from Jackson to Brandon, for which he was to receive about $281,000, the money to be paid from time to time, as P. in the construction of the road might, in his opinion require it. The Company failed to keep him supplied with par funds, and after paying him $298,026, most of which was in depreciated bank paper, they released him from the further prosecution of the road, and cancelled the mortgage he had given them for the diligent and faithful performance of the work on the road. When this release was given, and the mortgage cancelled, P. claimed large damages against the Company for their failure to comply with their contract; they refused to allow him the whole, but allowed him part of the amount claimed, and a final settlement took place between them; P. in his answer stated, and several witnesses proved that the settlement was made in good faith and fair. *Held*, that even though P. may have received more than he was strictly entitled to, the settlement was not only binding on the company, but was legal and valid as against their creditors. *Ib.*

Digitized by Google

9. L. filed his bill to be relieved against a judgment at law, recovered against him by M.; he alleged that he was in partnership with C. in erecting a saw mill; that a settlement and dissolution of the firm took place, and C. agreed to pay all the debts, the debt to M. being one of them; that the note on which the judgment was recovered was executed after the settlement, but antedated, and the signature of the firm of L. and C. attached without authority from L.; it was also alleged that M. knew that C. had undertaken to pay all the debts of the firm, and did not object. In an amended bill, it was stated that L. had no knowledge of the material facts set forth in the original bill, until after the judgment at law. M. filed a demurrer to the original and amended bills, which was sustained by the Court below, and the bills dismissed. *Held*, that the bills did not make a sufficient showing for relief in a court of equity, and that the demurrer was properly sustained. *Leggett* v. *Morris*, 723.

FREE PERSONS OF COLOR.

It is the policy of our state to prevent free persons of color remaining in it; nor does that policy conflict with the constitution of the United States, which declares "that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states;" as no person of color can become a citizen in the sense of the term used in the constitution. *Leech* v. *Cooley*, 93.

HIGH COURT OF ERRORS AND APPEALS.

1. Where a deed was read, without objection in the court below, the certificate of record of which was made by the deputy of the probate clerk, this court would not lend a willing ear to that objection, raised here for the first time. *Hundley* v. *Buckner*, 70.
2. Where the declaration against the indorser of a promissory note, in its first count, was in the usual form, but in the second did not aver demand and notice to the indorser, but as excuse for the omission averred that the maker of the note was insolvent; and the defendant plead non assumpsit, and a verdict, without any charge from the court, on proof of the insolvency, was rendered for the plaintiff; and the defendant moved for a new trial, which being refused he embodied the testimony in a bill of exceptions, and brought the case to this court: *Held*, that the statute of jeofails did not preclude this court from examining the case, and granting a new trial for want of sufficient evidence to uphold the verdict. *Reaves* v. *Dennis*, 89.
3. The statute which allows exceptions to the action of the circuit court in granting new trials, makes it the duty of the high court of errors and appeals to revise the judgment of the circuit court, and to do what that court should have done. *Ib.*
4. Where the bill of exceptions taken by the plaintiff to an order of the court

Digitized by Google

setting aside the service of the writ, after pleas were filed, and rendering a final judgment for the defendant, recites that the order thus excepted to was made on the motion of the plaintiff, while the judgment of the court itself states that it was made on the motion of the defendant; the high court of errors and appeals will adopt the construction that the order was made on the motion of the defendant, as the most sensible and consistent with the whole record. *Wooten* v. *Wingate*, 271.

5. C., being sued upon three notes made by an agent, plead *non assumpsit*, with an affidavit of its truth, and that the notes were not made by him. The plaintiff, on the trial, read a power of attorney from C. to the agent, authorizing him to purchase goods for C. to keep up a mercantile establishment owned by C. either for cash or on a credit, and to execute the notes of C. for that purpose. After the introduction of the power of attorney, the plaintiff, without other proof of the execution of the notes sued on, read them *without objection* on the part of the defendant to the jury. *Held*, that by permitting the notes to be thus read without objection, the defendant waived further proof of their due execution, and could not, on motion for a new trial, or in this court, object to a verdict against him on the ground that the notes had been improperly admitted in evidence.

Carter v. *Taylor*, 367.

6. The allowance or disallowance of continuances is in the discretion of the inferior court, and when that is exercised it will not be revised by the high court of errors and appeals. *Muirhead* v. *Muirhead*, 451.

7. Where, in an action upon an open account for attorney's fees, the jury render a verdict for the plaintiff; and at the trial the defendant offered a deposition, proving part payment of the account sued on, which was rejected improperly by the court below: *Held*, that the judgment below should be reversed; but upon the plaintiff's below entering a *remittitur* in this court of the amount proved by the deposition to have been paid, with interest, up to the rendition of the verdict below, this court will render a judgment for the balance. *Anderson* v. *Tarpley*, 507.

HUSBAND AND WIFE.

1. If the right of a married woman to her distributive portion of a deceased person's estate accrue after marriage, the husband may sue for it alone.

Henderson v. *Guyot*, 209.

2. If the husband sue alone for his wife's distributive portion in an estate, and it do not appear by proof that the right of the wife accrued before coverture, and the probate court decree in favor of the husband, the presumption will be in favor of the correctness of the decision of that court. *Ib.*

3. If the probate court, during the lifetime of a wife who is a distributee of an estate, decree the wife's distributive portion to be paid to the husband on his sole petition, and the wife die before the money is paid to the husband,

Digitized by Google

the death of the wife will not affect the right of the husband to such distributive portion. *Ib.*

4. U. purchased a tract of land of H.; and agreed to pay for it with other lands if title could be had to them, if not with a stipulated sum; upon which H. conveyed the land to U.'s wife; the title to the other lands not being made, H. filed his bill against U. and wife to subject the land sold by him, to the payment of the stipulated sum, the purchase-money thereof: *Held*, that the land was subject to the vendor's lien.

Upshur v. *Hargrove*, 286.

5. J. W. filed her petition for dower in the lands of her alleged husband, G. W.; J. S., the grantee of her husband, contested her right of dower on the ground that she was not the wife of G. W.; on the trial of the petition it was proved that J. W. was married to G. W. in 1814, and that in 1815, M. F., who had been married in 1809 to G. W. was alive; G. W. and J. W. after their intermarriage, lived together as man and wife for twenty-five years, until the death of G. W.: *Held*, that the wife of G. W. being alive when he married J. W. the latter marriage was absolutely null, and J. W. not his wife, and therefore not entitled to dower in his lands.

Smart v. *Whaley*, 308.

INDULGENCE.

In an action against the indorser of a bill of exchange, it was proved that the holder of the bill, after its maturity, received ten per cent. of its amount from the acceptor, and in consideration thereof agreed to wait until the drawer of the bill could be heard from, though the witness who testified to the agreement did not recollect that any definite time of payment of the balance due on the bill had been agreed on: *Held*, that the indulgence granted to the acceptor until the drawer could be heard from, based upon a sufficient consideration, exonerated the indorser. *Rupert* v. *Grant*, 433.

INFANTS.

1. In a suit in chancery against both adult and infant defendants, a decree rendered in favor of the complainants against all the defendants upon *pro confesso* against the adult defendants and the answer of guardians ad litem for the infants, without any proof, will be erroneous as to the infants, even though time be reserved in the decree to the infants after they come of age, to show cause against it. *Hargrove* v. *Martin*, 61.

2. Taking a case for confessed in equity, entitles the complainant to a decree only against the party as to whom the bill has been taken for confessed; not against the others; and if the defendant against whom no *pro confesso* is taken disprove the bill, the whole will be dismissed. *Ib.*

3. A pro confesso against an infant will not authorize a decree against him; there must be proof; and a reservation of a right to show cause against the decree after the infant attains majority, does not cure the error. *Ib.*

4. Whether the reservation of a right in an infant to show cause against the

Digitized by Google

decree after he attains majority, extends only to defects or errors in the decree itself, and is barred by a sale under the decree? *Quære.* *Ib.*

5. Where a decree has been rendered in the chancery court in a suit against adults and infants on *pro confesso* against the former, without proof, and this court on that account reverse the decree, the *pro confesso*, as to the adults, will not thereby be set aside. The cause will proceed as if no decree had been pronounced. *Ib.*

6. A decree against infants, foreclosing a mortgage, which is rendered without giving a day after their coming of age, to show cause against the decree, and without appointing a guardian *ad litem* for them, or taking the bill for confessed against them, will not for such irregularities be made void.

Smith v. *Bradley*, 485.

7. A decree for the sale of mortgaged premises instead of a technical foreclosure, is binding on an infant, although no day be given to show cause against it. *Ib.*

8. An infant defendant can after he comes of age only avoid a decree against him by showing errors in the decree; he cannot reinvestigate the subject-matter of the suit, nor can he redeem mortgaged premises which have been sold. *Ib.*

INJUNCTION.

1. Where a party wishes to obtain relief in equity against a judgment recovered against him in an action at law, to which he had a valid legal defence, though it was unknown to him at the time the judgment was rendered, it will not be sufficient to allege in his bill that the grounds of defence were not known to him at the time of the trial at law; he must also aver that he could not have obtained such knowledge by the use of ordinary diligence.

Leggett v. *Morris*, 723.

2. L. filed his bill to be relieved against a judgment at law recovered against him by M.; he alleged that he was in partnership with C. in erecting a saw-mill; that a settlement and dissolution of the firm took place, and C. agreed to pay all the debts, the debt to M. being one of them; that the note on which the judgment was recovered, was executed after the settlement, but antedated, and the signature of the firm of L. & C. attached without authority from L. It was also alleged that M. knew that C. had undertaken to pay all the debts of the firm, and did not object. In an amended bill, it was stated that L. had no knowledge of the material facts set forth in the original bill until after the judgment at law. M. filed a demurrer to the original and amended bills, which was sustained by the court below, and the bills dismissed. *Held*, that the bills did not make a sufficient showing for relief in a court of equity, and that the demurrer was properly sustained. *Ib.*

INSTRUCTIONS.

1. Where, in an information in the nature of a *quo warranto* against a bank, the court was asked to charge the jury that "if they believed from the evi-

Digitized by Google

dence that it was agreed between the cashier of the bank and M., a holder of part of the capital stock of the bank, that he should, to make payment of his stock and evade the charter of the bank, procure the notes of the bank which was then a non specie-paying bank; that the cashier should receive the notes, count out their amount in specie and immediately take or receive back said specie, without M. being at liberty to take the same away from the bank, and that he should thereupon receive a certificate of stock, and that said M. did so pay an instalment on his stock and receive a certificate, they must find for the plaintiff; there being proof that the board of directory had given positive directions that nothing but gold or silver, or the notes of specie-paying banks should be received in payment of stock; it was *held*, that the charge as asked was properly refused, not having reference to the testimony before the jury.

The State v. *The Commercial Bank of Manchester*, 218.

2. Where a case has been submitted to a jury and they have retired to consider of their verdict, it will be error for the court, without the consent of the parties, to explain, at the request of the jury, a matter of law to them, bearing upon the case, upon which they notified him they had doubts.

Taylor v. *Manley*, 305.

3. Where, in an action against the indorser of a note, payable at a bank with business hours, the judge instructed the jury that a demand of payment 'in some reasonable or convenient time before the doors were closed,' would be sufficient; it was *held*, that the instruction was erroneous.

Harrison v. *Crowder*, 464.

ISSUE.

1. Where an issue has been made up in the probate court and sent to the circuit court, for trial before a jury upon the rendition of the verdict, the issue must be sent back to the probate court for judgment; and if the circuit court undertake to render a judgment upon such verdict, that judgment will be a nullity. *Wallace* v. *Wingate*, 151.
2. Where a circuit court has rendered a judgment upon a verdict on an issue from the probate court, no appeal or writ of error will lie from such judgment, it being a nullity; and if one be prosecuted it will be dismissed. *Ib.*
3. If the probate court, after the trial of an issue from it in the circuit court, refuse to grant a new trial, the whole proceedings may be brought up to the high court of errors and appeals for revision in all their parts. *Ib.*

JEOFAILS, STATUTE OF.

1. Where the declaration against the indorser of a promissory note in its first count was in the usual form, but in the second did not aver demand and notice to the indorser, but as excuse for the omission, averred that the maker of the note was insolvent; and the defendant plead non assumpsit, and a verdict, without any charge from the court, on proof of the insolvency was rendered for the plaintiff; and the defendant moved for a new trial, which

Digitized by Google

being refused, he embodied the testimony in a bill of exceptions and brought the case to this court. *Held*, that the statute of jeofails did not preclude this court from examining the case and granting a new trial for want of sufficient evidence to uphold the verdict. *Reaves* v. *Dennis*, 89.

2. Where the declaration fails to make out a case against the defendant, and he, instead of demurring, pleads to the action and a verdict and judgment are given against him, it seems that under the statute of jeofails, the defect in the pleadings will be cured, and the judgment be undisturbed. But *aliter* if the evidence be embodied in the record on the overruling of a motion for a new trial. *Ib.*

JUDGMENT.

1. Where an execution on a younger judgment was levied in December, 1840, on personal property which was advertised for sale on the 4th day of January, 1841, under that levy; and on the day of sale an execution on an older judgment was levied on the property under sale by virtue of the first levy; the judgment first levied and under which the sale takes place, though junior in date, will be entitled to the proceeds of the sale; but the purchaser of the property will hold it subject to the lien of the older judgment. *Calmes* v. *Ford*, 190.
2. A judgment *non obstante veredicto* cannot be rendered after a judgment upon the verdict has been entered; the rule on that subject is, that the motion for such judgment (*non obstante veredicto*) must be made immediately after the verdict, and before a judgment is rendered on it. *The State* v. *The Commercial Bank of Manchester*, 218.
3. If an executor, against whom, as such, various judgments have been obtained, use the assets of the estate of his testator in the payment of the junior judgments against him as such executor, leaving the eldest judgment unpaid, he will be guilty of a *devastavit*; and will be liable to a proceeding against him by *scire facias*, as such executor, to subject him to the payment *de bonis propriis* of the judgment recovered against him as executor and thus left unpaid. *Black* v. *Barton*, 239.
4. In such case the *scire facias* should state what amount of assets had come to the hands of the executor, as he would not be liable beyond that sum. *Ib.*
5. The executor may plead to such *scire facias*, notwithstanding the former judgment against him, *plene administravit*; and will be discharged if he can show a full and proper administration of the estate; such plea will not, however, be supported if there has been a misapplication of assets. *Ib.*
6. In an action of replevin under the statute of 1842, a judgment in favor of the plaintiff for so much money is erroneous; it should be in the alternative, for the property, if to be had, if not, then for its value. *Anderson* v. *Tyson*, 244.
7. The judgment in replevin, if in favor of the plaintiff, where the defendant has elected to give bond and retain possession of the property, should be entered against both principal and surety in such bond. *Ib.*

Digitized by Google

8. In an action upon a judgment rendered in another state, if the bill of exceptions taken to the admission of the record in evidence does not embody the record itself, this court will not notice it, even though a record answering the description of the one sued on is inserted by the clerk in the transcript for this court. *Wright* v. *Bank of Alabama*, 251.

9. Upon demurrer to a plea *puis darrein continuance* being sustained, the judgment of the court under the statute (How. & Hutch. 615, § 8,) should be *respondeat ouster*, and not *quod recuperet*. *McDugald* v. *The Union Bank*, 338.

10. Where money is levied upon several executions, that is entitled to be first satisfied which issued upon the eldest judgment. *Jennings* v. *Dennis*, 379.

11. J. being a judgment creditor of V., sued out his execution of *fieri facias*; subsequently D., also a judgment creditor of V. whose judgment was three days the elder, issued his execution likewise; the executions were both levied on the same day on two slaves, the property of V. Before the levy, J. gave an indemnifying bond; two days after the levy, D. gave a similar bond. Soon after, and before the executions on which these levies had been made had been otherwise acted on, D. sued out an *alias fieri facias* to another county, and had it levied on another slave, the property of V.; afterwards D., finding the first levy sufficient, and relying on it for his debt, released the second levy. On motion for the appropriation of the money made by the sale of the two slaves first levied on, *held*, that D.'s judgment being the eldest, and nothing having been done to lose its lien, was entitled to the money. *Ib.*

12. A judgment may be assigned by the judgment creditor to a third party; by such assignment the beneficial interest in the judgment will pass to the party, who will have the right to use the name of the judgment creditor to enforce the execution. *Vanhouten* v. *Reily*, 440.

13. Where a judgment has been obtained against the administrators of a deceased person, and they, without paying the judgment, proceed to distribute the deceased's property among his legal distributees until it is all divided, the judgment creditor may levy his execution on any of the property thus distributed; and that, too, though the judgment should be assigned, and at the time of the levy belong to one of the distributees. *Ib.*

14. O., in February, 1840, obtained judgment at law against G. & B. S., as administrators of M. S., deceased. In July, 1839, G. & B. S. had resigned their letters of administration, and J. R. G. been appointed administrator *de bonis non* of M. S., and was in that office when judgment in favor of O. was rendered; *held*, that the judgment in favor of O., thus obtained, was neither binding upon the estate nor upon J. R. G., the administrator, and was a nullity. *Buckingham* v. *Owen*, 502.

Digitized by Google

JURISDICTION.

1. A court having once acquired jurisdiction, does not lose it by any change of circumstances. *Read* v. *Renaud*, 79.

2. C. & H. filed a petition in the probate court against W. C. alleging that W. C. and themselves were jointly administrators *ad colligendum* on the estate of S. C., and that W. C. had in his possession property of the estate which he claimed as his own, and refused to allow it to be inventoried, and prayed that he might be required to inventory it; W. C. filed a plea to the jurisdiction of the probate court: *held*, that the probate court should entertain jurisdiction of the petition; and W. C. might have an issue to the circuit court for the investigation of his claim to the property in his possession. *Compton.* v. *Compton*, 194.

3. *Aliter*, if W. C. had been a stranger to the administration. *Ib.*

4. Where, upon the death of one partner, the survivor assigns to a trustee partnership effects to secure creditors, the administrator of the deceased partner cannot implead the surviving partner and the trustee in the probate court, to compel them to account for the effects thus transferred. *Searles* v. *Scott*, 246.

5. In such case, the probate court would have jurisdiction of neither the persons nor the subject-matter. *Ib.*

6. A non-resident being sued in a state court for a sum exceeding five hundred dollars, is entitled, under the act of congress, on the performance of the necessary requirements, to have the suit transferred to the next term of the United States circuit court for the district where he was sued; and on proper application to the state court it will be error for that court to refuse the transfer. *Hill* v. *Henderson*, 351.

7. Nor will it make any difference if such non-resident be sued as executor; he will still be entitled, on the proper showing, to the removal of his cause to the United States court. *Ib.*

8. If the United States court and the state court wherein such non-resident be sued, commence their session on the same day, a fair construction of the act of congress will give the non-resident the right to have the transfer made and returned to the next succeeding term of the court. *Ib.*

9. Where third persons are made parties to a widow's application for dower in her deceased husband's realty, in the probate court and contest her right, the consent of the parties thereto will not give that court jurisdiction of the subject-matter, and the rights of the parties thus illegally before the court will remain the same as if no decision had been made affecting them. *James* v. *Rowan*, 393.

10. Where a deed was made to J. and his sister, conveying a tract of land to them jointly, on the application of the widow of J. for dower in the land thus conveyed, his sister being in possession: *held*, that the legal title in J. by the deed in the absence of proof of an *ouster*, or that the possession of

Digitized by Google

the sister was adverse, entitled his widow to dower, as against his representatives in the land; nor could the probate court enter upon the inquiry as to whether J. was a trustee for his sister, who had paid the purchase-money for the land; that inquiry and any other affecting his sister's title to the land, or the rights of other persons may be presented when the widow attempts to enforce her allotment of dower. *Ib.*

11. A suit upon an administrator's bond cannot be maintained in the probate court. The remedy thereon is at law. *Washburn* v. *Phillips*, 425.

12. The application to the probate court to have an administrator's bond declared forfeited, and for leave to put in suit, is intended by the statute to be *ex-parte* in its character, and the sureties on the bond have no right to contest their liability in that stage of the proceeding. *Ib.*

13. G. & B. S. administered upon the estate of M. S., when O. obtained judgment at law against them as such administrator. G. & B. S. resigned their office, and J. R. G. was appointed administrator *de bonis non*, took possession of the estate, used and wasted the assets, and died insolvent, and without personal representatives. D. was appointed administrator *de bonis non* of M. S. and represented the estate insolvent; whereupon O. filed his bill in chancery, against the sureties of J. R. G. on his bond, to compel them to pay his judgment: *Held*, that a court of chancery had no jurisdiction of the bill. *Buckingham* v. *Owen*, 502.

14. A widow is not entitled to dower in lands which her husband held, only by virtue of a lease for ninety-nine years; such lease vested but a chattel interest in the husband, out of which the widow is not dowable.

Ware v. *Washington*, 737.

JURY.

1. Where a jury in the trial of an action for assault and battery, after having retired to make up their verdict, agreed immediately upon entering into the jury room, that each should put down a sum which should be divided by twelve, and that the result should give the amount of damages to be found by their verdict; and this agreement was carried out and acted on; *held*, that the verdict so found was irregular, and should be set aside.

Parham v. *Harney*, 55.

2. Whether the affidavits of jurors to establish the conduct of the jury while in the jury room, are admissible on a motion for a new trial? *Quære? Ib.*

3. Where a case has been submitted to a jury, and they have retired to consider of their verdict, it will be error for the court, without the consent of the parties, to explain, at the request of the jury, a matter of law to them bearing upon the case, upon which they notified him they had doubts.

Taylor v. *Manley*, 305.

4. In an action against the indorser of a promissory note payable at a bank with banking hours, the notary testified that he had no recollection of the fact or time of presentment, except from his protest, from which he had no

Digitized by Google

doubt that he did present the note; that when he protested the note sued on, his habit was to make demand of payment *about* the close of banking hours, believing that practice to conform to the law; when payment was refused he took the note away with him; he could not say whether the note sued on had been presented an hour or a minute before the close of the bank, except from his habit of presentation: *Held*, that the testimony should have been left to the jury, for them to say whether the demand on the note had been made about the close of banking hours.

Harrison v. *Crowder*, 464.

5. If a claim be placed in the hands of two attorneys practising in partnership, and before any steps are taken in the collection of the claim, the firm dissolve, and one of the members take charge of the claim, and render all the services in its collection, and sue individually the owner of the claim for his fees for so doing, the jury will be justified in inferring that it was part of the contract of dissolution between the partners, that the one who has rendered the services should attend to the claim and receive the compensation, and their verdict to that effect will be upheld.

Anderson v. *Tarpley*, 507.

JUSTICE OF PEACE.

Where a slave has been prosecuted before a justice of the peace for larceny, under the statute (H. & H. 164, § 40,) and the justice has adjudged the costs of the prosecution against the owner of the slave, the circuit court has jurisdiction of a *certiorari*, at the instance of the owner, to determine whether, so far as the judgment for costs extended, the decision of the justice had been according to law and facts. *Atchison* v. *Potter*, 120.

LACHES.

Where a deposition has been excluded from the jury on the ground that the commission under which it was taken was irregular, in not having the name of the commissioner in it when it issued, the party who took the deposition cannot obtain a new trial on the ground of surprise in the exclusion of the deposition, as that exclusion was owing to his own laches in irregularly suing out the commission. *Rupert* v. *Grant*, 433.

LARCENY.

The statute, which subjects the master, employer, or overseer of a slave convicted of larceny, to the costs of prosecution, designed to render the person who had the slave in charge at the time of the commission of the offence, liable for the costs; whether he were master-employer or overseer. It would seem, therefore, that a judgment for costs in such case against a master who had not the slave in his employ at the time of the offence, would be erroneous. *Atchison* v. *Potter*, 120.

Digitized by Google

LEASEHOLD INTEREST.

A widow is not entitled to dower in lands, which her husband held only by virtue of a lease for ninety-nine years; such lease vested but a chattel interest in the husband, out of which the widow is not dowable.

Ware v. *Washington*, 737.

LEGISLATURE.

1. All legislation which materially affects the laws for the enforcement of a contract, existing at the time it is made, impairs the obligation of the contract. *Nevitt* v. *The Bank of Fort Gibson*, 513.
2. The right of the legislature to remit a penalty, or forfeiture imposed by law, exists and may be enforced without impairing the obligation of any contract to which the penalty or forfeiture may be attached. *Ib.*
3. Where a bank has forfeited its charter, it is a legitimate and proper exercise of legislative power to provide by law for the preservation of the property of the bank for the benefit of its creditors, by remitting the penalties which attach to a judicial judgment of forfeiture of its charter. *Ib.*

LIEN.

1. Where an execution on a younger judgment, was levied in December, 1840, on personal property, which was advertised for sale, on the 4th day of January, 1841, under that levy; and on the day of sale, an execution on an older judgment was levied on the property under sale by virtue of the first levy; the judgment first levied, and under which the sale takes place though junior in date, will be entitled to the proceeds of the sale but the purchaser of the property will hold it subject to the lien of the older judgment. *Calmes* v. *Ford*, 190.
2. A vendor of land who takes no separate or other security for the purchase-money, retains a lien upon the land for its payment; and none but *bona fide* purchasers, without notice, can set up an implied waiver of this equitable mortgage. *Upshur* v. *Hargrove*, 286.
3. To constitute a *bona fide* purchaser without notice, the party must have advanced a new consideration, or have relinquished some security for a pre-existing debt. *Ib.*
4. U. purchased a tract of land of H., and agreed to pay for it with other lands if title could be had to them; if not, with a stipulated sum; upon which H. conveyed the land to U.'s wife; the title to the other lands not being made, H. filed his bill against U. and wife to subject the land sold by him, to the payment of the stipulated sum, the purchase-money thereof: *Held*, that the land was subject to the vendor's lien. *Ib.*
5. Where money is levied upon several executions, that is entitled to be first satisfied which issued upon the eldest judgment.

Jennings v. *Dennis*, 379.

Digitized by Google

6. J. being a judgment creditor of V., sued out his execution of *fieri facias*; subsequently D., also a judgment creditor of V., whose judgment was three days the elder, issued his execution likewise; the executions were both levied on the same day on two slaves, the property of V. Before the levy J. gave an indemnifying bond; two days after the levy, D. gave a similar bond; soon after, and before the executions on which these levies had been made, had been otherwise acted on, D. sued out an *alias fieri facias* to another county, and had it levied on another slave, the property of V.; afterwards D. finding the first levy sufficient and relying on it for his debt, released the second levy. On motion for the appropriation of the money made by the sale of the two slaves first levied on; *held*, that D.'s judgment being the eldest, and nothing having been done to lose its lien, was entitled to the money. *Ib.*

LIMITATIONS (STATUTE OF.)

The plea, to an action to recover for services as physician, that the account had not accrued within *three* years, is bad. The limitation of three years does not apply to such case. *Hazlip* v. *Leggett*, 326.

MANDAMUS.

Whether a *mandamus* is the appropriate remedy to compel a sheriff to make a deed to property which he has sold as sheriff. *Quære?*

Davis v. *Pryor*, 114.

MARRIAGE AND MARRIED WOMEN.

1. If the right of a married woman to her distributive portion of a deceased person's estate accrue after marriage, the husband may sue for it alone.

Henderson v. *Guyot*, 209.

2. If the husband sue alone for his wife's distributive portion in an estate, and it do not appear by proof that the right of the wife accrued before coverture, and the probate court decree in favor of the husband, the presumption will be in favor of the correctness of the decision of that court. *Ib.*

3. If the probate court during the lifetime of a wife who is a distributee of an estate, decree the wife's distributive portion to be paid to the husband on his sole petition, and the wife die before the money is paid to the husband, the death of the wife will not affect the right of the husband to such distributive portion. *Ib.*

4. J. W. filed her petition for dower in the lands of her alleged husband, G. W.; J. S., the grantee of her husband, contested her right of dower on the ground that she was not the wife of G. W.; on the trial of the petition it was proved that J. W. was married to G. W. in 1814, and that in 1815, M. F., who had been married in 1809 to G. W., was alive. G. W. and J. W. after their intermarriage, lived together as man and wife for twenty-five years, until the death of G. W.: *Held*, that the wife of G. W.

Digitized by Google

being alive when he married J. W., the latter marriage was absolutely null, and J. W. not his wife, and therefore not entitled to dower in his lands.
Smart v. *Whaley*, 308.

MASTER AND SLAVE.

The statute which subjects the master, employer, or overseer of a slave, convicted of larceny, to the costs of prosecution, designed to render the person who had the slave in charge at the time of the commission of the offence, liable for the costs; whether he were master, employer or overseer. It would seem therefore, that a judgment for costs in such case against a master who had not the slave in his employ at the time of the offence, would be erroneous. *Atchison* v. *Potter*, 120.

MESNE PROCESS.

1. Where the assignee of one of a series of notes, all secured by mortgage, sues the debtor at law, and arrests him upon mesne process, and afterward, from the inability of the debtor to give bail, and, out of clemency, discharge him from the arrest, the mortgage lien of such assigned note will not thereby be divested, or taken away. *Terry* v. *Woods*, 139.
2. It seems it would be otherwise, if the discharge were upon an arrest on final process. *Ib.*

MISTAKE.

1. An affidavit to procure an attachment, stating that the defendants "are concealing their effects so that the ordinary process of the law cannot be served on them, and that the claim against them will be defeated," &c., is sufficient. *Lovelady* v. *Harkins*, 412.
2. If the process in attachment, by mistake of the justice, recited that the plaintiffs were concealing their effects, &c., instead of the defendants, and the bond and affidavit contained correct recitals, the court will look to the whole record, and not construe it so as to defeat its own end. *Ib.*

MORTGAGE.

1. The rule that if personal property be left in the possession of the grantor or vendor, it is evidence of fraud, has no application to deeds of trust or mortgages duly recorded; it is confined to absolute sales; the recording of the mortgage is equivalent to an actual delivery of the property.
Hundley v. *Buckner*, 70.
2. The assignment of a note secured by mortgage, carries the benefit of the mortgage along with it to the assignee. *Terry* v. *Woods*, 139.
3. Where the assignee of one of a series of notes, all secured by mortgage, sues the debtor at law and arrests him upon *mesne* process, and afterward, from the inability of the debtor to give bail, and out of clemency discharge him from the arrest, the mortgage lien of such assigned note will not thereby be divested or taken away. *Ib.*

Digitized by Google

It seems it would be otherwise if the discharge were upon an arrest on final process. *Ib.*

5. Where the holder of one of a series of notes, secured by mortgage, upon the arrest, on mesne process, of the judgment debtor, discharges the debtor from the arrest, and, at the same time, receives a steamboat from him as collateral security, which he afterwards exchanges with the debtor for notes, also as collateral, which prove worthless; the holder of the assigned note does not thereby discharge the lien of the mortgage as to the note so held by him. *Ib.*

6. Where a decree was rendered at the suit of the holder of one of a series of mortgaged notes against the mortgage debtor, subjecting the property mortgaged to the payment of the mortgage debt, and in neither the pleadings nor proof it appeared that the mortgage property was an inadequate security for all the mortgage debts: *Held*, that at the mere suggestion of counsel that such might be the case the decree would not be reversed. *Ib.*

7. Where the holder of one of a series of mortgaged notes, indorsed the note to a third person before due, and after its maturity and non-payment takes it up and becomes again the holder thereof, he will not thereby lose his recourse upon the mortgaged premises, but will be substituted again to his original rights. *Ib.*

8. A vendor of land who takes no separate or other security for the purchase-money, retains a lien upon the land for its payment; and none but *bona fide* purchasers, without notice can set up an implied waiver of this equitable mortgage. *Upshur* v. *Hargrove*, 286.

9. To constitute a bona fide purchaser without notice, the party must have advanced a new consideration or have relinquished some security for a pre-existing debt. *Ib.*

10. U. purchased a tract of land of H., and agreed to pay for it with other lands, if title could be had to them; if not, with a stipulated sum. Upon which H. conveyed the land to U.'s wife. The title to the other lands not being made, H. filed his bill against U. and wife, to subject the land sold by him to the payment of the stipulated sum, the purchase-money thereof: *Held*, that the land was subject to the vendor's lien *Ib.*

11. Where a vendor of land has given a bond for title, without affixing any time in which it is to be made, and takes notes, payable at a fixed time, for the purchase-money; and afterward, but before the notes are paid, executes a defective deed to the vendee, he will not thereby be deprived of his right to recover on the notes; as the execution of the defective deed does not absolve him from the obligation of his bond to make a good title; which the vendee may still demand. *Hazlip* v. *Noland*, 294.

12. Whether, where a vendee of land who has a bond for title from the vendor, dies before paying the purchase-money, and his administrators are sued therefor, the administrators can object to a deed from the vendor, made but not delivered before the vendee's death, for insufficiency or im-

Digitized by Google

perfection, so as to call in question the validity of the title to the land, by way of assailing the validity of the notes. *Quære? Ib.*

13. Whether, where a vendor who has given a bond for title recites, in his deed conferring title, that he grants, bargains, and sells the land, and in the conclusion of the deed warrants the title only against himself and heirs, he thereby limits the statutory warranty given to the words, grant, bargain, and sell. *Quære? Ib.*

14. Where a party agrees to make a security in future, that is construed in equity as an equitable mortgage, but the equitable mortgage becomes merged whenever a mortgage is executed according to the agreement of the parties. *Petrie* v. *Wright*, 647.

15. P. gave a mortgage to a railroad company, as a security for the performance of certain work, and the chancellor rendered a decree of foreclosure of the mortgage for a balance found to be due by P. to the company, on an account stated between them: *Held*, that the mortgage being a mere security for the performance of work, and not for the payment of a debt, the decree was erroneous. *Ib.*

MOTION.

1. To an action brought by a bank on a note payable to it by its corporate name, pleas denying the corporate existence of the bank, at the time of the execution of the note, and setting up violations of its charter, and asserting a failure of the bank to comply with certain prerequisites of its corporate existence, however defective they may be in form, cannot be stricken out on motion; they must be reached by demurrer. *Smith* v. *The Commercial Bank of Rodney*, 83.

2. Upon motion to dismiss an attachment, the court cannot look beyond the face of the bond itself; if it be valid upon its face that is sufficient. *Spear* v. *King*, 276.

3. If an attachment bond be signed by A. as agent for the attaching creditor and be in other respects regular, the court cannot, on motion to dismiss the attachment, inquire into the question as to the agency of A. *Ib.*

4. Where a motion to quash a forthcoming bond is taken by the circuit judge under advisement, and his decision not rendered in four months as required by the statute, (How. & Hutch. 481,) the motion will be considered as having expired with the term. *Puckett* v. *Graves*, 384.

5. Every motion made in a cause, constitutes part of its history, and is as much a part of the record as the declaration, plea, or judgment. *Ib.*

NEW TRIAL.

1. Where a jury in the trial of an action for assault and battery, after having retired to make up their verdict, agreed, immediately upon entering into the jury room, that each should put down a sum which should be divided by twelve, and that the result should give the amount of damages to be found by their verdict; and this agreement was carried out and acted on; *held*,

Digitized by Google

the verdict so found was irregular, and should be set aside. *Parham* v *Harney*, 55.

2. Whether the affidavits of jurors to establish the conduct of the jury while in the jury room are admissible, on a motion for a new trial? *Quære.* *Ib.*
3. Where the declaration against the indorser of a promissory note in its first count was in the usual form, but in the second did not aver demand and notice to the indorser, but as excuse for the omission averred that the maker of the note was insolvent; and the defendant plead *non assumpsit*, and a verdict, without any charge from the court, on proof of the insolvency, was rendered for the plaintiff; and the defendant moved for a new trial, which being refused, he embodied the testimony in a bill of exceptions and brought the case to this court: *Held*, that the statute of jeofails did not preclude this court form examining the case and granting a new trial for want of sufficient evidence to uphold the verdict. *Reaves* v. *Dennis*, 89.
4. The statute which allows exceptions to the action of the circuit court in granting new trials, makes it the duty of the high court of errors and appeals to revise the judgment of the circuit court and to do what that court should have done. *Ib.*
5. Where the declaration fails to make out a case against the defendant, and he, instead of demurring, pleads to the action, and a verdict and judgment are given against him, it seems that, under the statute of jeofails, the defect in the pleadings will be cured, and the judgment be undisturbed. But, *aliter*, if the evidence be embodied in the record on the overruling of a motion for a new trial. *Ib.*
6. If the probate court, after the trial of an issue from it in the circuit court, refuse to grant a new trial, the whole proceedings may be brought up to the high court of errors and appeals for revision in all their parts. *Wallace* v. *Wingate*, 151.
7. Where a bill of exceptions is taken to the refusal of the court to grant a new trial, but does not embody the evidence or set forth anything upon which the court can act, the judgment of the court below will be affirmed. *Wright* v. *Bank of Alabama*, 251.
8. C. being sued upon three notes made by an agent, plead *non assumpsit*, with an affidavit of its truth, and that the notes were not made by him. The plaintiff on the trial read a power of attorney from C. to the agent authorizing him to purchase goods for C., to keep up a mercantile establishment owned by C., either for cash or on a credit, and to execute the notes of C. for that purpose. After the introduction of the power of attorney, the plaintiff, without other proof of the execution of the notes sued on, read them, without objection on the part of the defendant, to the jury. *Held*, that by permitting the notes to be thus read without objection, the defendant waived further proof of their due execution, and could not, on motion for a new trial, or in this court, object to a verdict against him on the ground that the notes had been improperly admitted in evidence. *Carter* v. *Taylor*, 367.
9. Where a deposition has been excluded from the jury on the ground that

Digitized by Google

the commission under which it was taken was irregular in not having the name of the commissioner in it when it issued, the party who took the deposition cannot obtain a new trial on the ground of surprise in the exclusion of the deposition, as that exclusion was owing to his own laches in irregularly suing out the commission. *Rupert* v. *Grant*, 433.

10. H. engaged S. as an overseer for a year, at $650; before the year expired, S. left without the knowledge or consent of H., though he employed a substitute, who, during the absence of S., conducted the business of H. equally as well as S. could have done. S. sued H. for his full wages, and the jury returned a verdict in favor of S. for the whole amount claimed, with interest. H. moved for a new trial, and the court below overruled the motion: *Held*, that the verdict was excessive, and a new trial should have been granted. *Hariston* v. *Sale*, 634.

NON-RESIDENTS.

1. A non-resident being sued in a state court, for a sum exceeding five hundred dollars, is entitled, under the act of congress, on the performance of the necessary requirements, to have the suit transferred to the next term of the United States circuit court for the district where he was sued; and on proper application to the state court, it will be error for that court to refuse the transfer. *Hill* v. *Henderson*, 351.
2. Nor will it make any difference if such non-resident be sued as executor; he will still be entitled, on the proper showing, to the removal of his cause to the United States court. *Ib.*
3. If the United States court, and the state court wherein such non-resident be sued, commence their session on the same day, a fair construction of the act of congress will give the non-resident the right to have the transfer made and returned to the next succeeding term of the court. *Ib.*
4. In order to authorize a publication against a non-resident defendant to a suit in chancery, it must appear in the record by affidavit that such defendant *is a non-resident* of the state; an affidavit therefore, merely that he is a *citizen* of a different state will not be sufficient. *McKiernan* v. *Massingill*, 375.

NOTICE.

1. The insolvency of the maker of a promissory note is no excuse for not making demand of payment, and not giving notice of protest. *Reaves* v. *Dennis*, 89.
2. If the holder of a promissory note be ignorant of the place where the indorser resides at the time of protest, and cannot ascertain it after diligent inquiry, notice of protest sent to the place where the note bears date will be sufficient. *Godley* v. *Goodloe*, 255.
3. The question of due diligence in serving notice of protest, when it depends on the testimony of witnesses before a jury, must be submitted to the jury for their decision under appropriate charges as to the law from the court; if

Digitized by Google

the evidence be agreed on by the parties, the question of due diligence is then one purely of law for the decision of the court. *Ib.*

4. Whether an award upon the voluntary submission to arbitration by the parties, made by the arbitrators without notice to the parties, is void? *Quære? Upshur* v. *Hargrove*, 286.
5. Where a bill in chancery sets up an award of arbitrators, and traces the claim of the complainant through it, the award will be held *prima facie* good, on *pro confesso*, even though the bill does not aver that the award was made upon notice. *Ib.*
6. Possession is notice to the purchaser at execution sale, of the title of the party in possession, though he have no deed to the property, or other title of record. *Wilty* v. *Hightower*, 345.

OFF-SET.

1. The plea of set-off to an action of assumpsit does not exist in this state, and if pleaded is a nullity. *Henry* v. *Hoover*, 417.
2. Under the statute of this state the right of set-off exists, and may be made available under the plea of payment. *Ib.*
3. In an action of assumpsit the defendant plead a special plea of set-off, which was the only plea pleaded; the plaintiff took issue upon it, and a verdict was rendered thereon, and judgment given accordingly: *Held*, that the mispleading was cured by the verdict, and that the verdict and judgment should not be disturbed. *Ib.*
4. The Commercial Bank of Manchester lent to C. & M. $12,000, for which they were to ship cotton to the merchants of the bank, to be shipped to Liverpool and sold for account of C. & M.; and the proceeds to be credited on the note of C. & M. for the sum lent; C. & M. shipped 200 bales of cotton, which were sent to Liverpool, and for which the bank credited C. & M.'s note with $6,711 39, as the proceeds of sale; C. & M. not being satisfied with the credit thus given, it was *held*, that they had a right to show, by way of increasing the amount of offset, the quality of the crop of cotton of that year, the usual weight of the bales, and the average price at Liverpool about the time the sale took place.
The Commercial Bank of Manchester v. *Chisholm*, 457.
5. Nor in such case would the defendant be authorized to show that the notes of the bank, at and near the time of the maturity of the note, were at a discount in New Orleans, by way of increasing the amount of set-off; if any such inquiry be instituted into the value of the money loaned, it must be confined to the time of the loan, and the place where it occurred. *Ib.*
6. If the notes were at par value when received by C. & M., and the bank be by the contract liable for the difference of exchange, the measure of her liability would be the premium between par and exchange on Liverpool at the time of the sale of the cotton. *Ib.*

Digitized by Google

7. If the notes were below par when paid out by the bank, then the amount of discount on them must be added to that premium, so as to make them equivalent to par funds, at the time they were paid out. *Ib.*

8. A special plea of set-off in an action of *assumpsit* may properly be treated as a nullity. Yet if it be demurred to, the demurrer must be disposed of, or it will be error. *Anderson* v. *Burke*, 475.

9. When a plea of set-off to an action of *assumpsit* is filed and demurred to, however technically correctly it may be pleaded, the plea being such as from its intrinsic nature, a judgment according to law cannot be given sustaining it, the demurrer must be sustained. *Ib.*

10. A. being sued by B. in *assumpsit* for wages due B. as overseer for A., plead a special plea of set-off, in effect that B. was indebted to A. in the sum of one thousand dollars, and had promised to pay it in consideration of the death of A.'s slave, caused by B. To this plea B. demurred: *Held*, that the demurrer was properly sustained. *Ib.*

11. Where, in an action upon an open account for attorney's fees, the jury render a verdict for the plaintiff; and at the trial the defendant offered a deposition, proving part payment of the account sued on, which was rejected improperly by the court below; *held*, that the judgment below should be reversed; but upon the plaintiff's below entering a *remittitur* in this court of the amount proved by the deposition to have been paid, with interest up to the rendition of the verdict below, this court will render a judgment for the balance. *Anderson* v. *Tarpley*, 507.

OVERSEER.

1. In this country a contract for overseers' wages is not an entire contract by the year; and although an overseer may contract for a year, and may be turned off for misconduct before the time expires, he is, notwithstanding, entitled to recover for the time he conducted himself properly. *Harriston* v. *Sale*, 634.

2. An overseer, having been engaged, cannot put another in his place, though equal to himself in capacity, without the consent of his employer. *Ib.*

3. H. engaged S. as an overseer, for a year, at $650; before the year expired S. left without the knowledge or consent of H., though he employed a substitute who, during the absence of S. conducted the business of H. equally as well as S. could have done; S. sued H. for his full wages, and the jury returned a verdict in favor of S. for the whole amount claimed, with interest; H. moved for a new trial and the court below overruled the motion: *Held*, that the verdict was excessive, and a new trial should have been granted. *Ib.*

PARTIES.

1. By pleading to the merits the defendant waives any objection that may exist as to the character in which the plaintiff has brought the suit. *Hemphill* v. *Bank of Alabama*, 44.

Digitized by Google

2. L. sued S. & H. and P. & M. upon a joint note; M. died during the progress of the suit and before judgment; whereupon L. having brought the administrators of M. before the court by *sci. fa.* dismissed the suit as against the other parties and took judgment against the administrators of M.: *Held*, that the proceedings were regular and proper. *Woodhouse* v. *Lee*, 161.

3. A plaintiff in an action upon a joint note, may discontinue the suit as to any one or more of the defendants, and proceed to judgment against the others. *Ib.*

4. Our statute directs that the death of the nominal plaintiff during the pendency of a suit shall not cause its abatement; but it does not authorize the commencement of a suit in the name of a person no longer in existence. *Humphreys* v. *Irvine*, 205.

5. It is erroneous to exclude evidence that the nominal plaintiff died before the suit was instituted; for if it be shown to the satisfaction of the court that the nominal plaintiff was dead at the time the suit was commenced, the effect must be an abatement of the suit. *Ib.*

6. The representatives of the deceased husband are the only proper parties to a proceeding by the widow to be endowed of her husband's realty. *James* v. *Rowan*, 393.

7. The rights of third parties are in nowise affected by a decree of the probate court allotting dower to the widow in her deceased husband's realty; those who have such rights may put the widow to her ejectment or other appropriate remedy, and in such proceeding the respective claims will be considered in a great degree as if no decree of the probate court had been pronounced. *Ib.*

8. Where an administrator has left the state with the property of his intestate, can the distributees of the estate proceed by publication to make such absent administrator a party to a proceeding in the probate court by bill, for an account of his indebtedness to the estate and to have his bond put in suit against the sureties? *Quære? Washburn* v. *Phillips*, 425.

9. J. and R. being assignees of a note payable to B., sued the makers thereon at law: the defendant plead payment and a special plea of tender; the substance of which was that though the note was payable to B. on its face, yet it was in reality the property of the Hernando Bank when made, and was by agreement to be paid in the notes of the bank, which notes, for the sum due they had tendered, six months after the maturity of the note, to the assignees. A demurrer to the plea of tender having been sustained and a trial had upon the plea of payment and verdict, and judgment rendered for the amount of the note, in favor of the assignees; the defendants, on writ of error to this court, insist upon their right to pay the judgment in the notes of the bank, by which the note was alleged to have been assigned; *Held*, that the defendants below having permitted the suit there to be conducted by the plaintiffs as assignees of B., without question of their character in that particular by proper plea, had admitted their right

Digitized by Google

to sustain their suit in that character, and it could not now be questioned. *Lanier* v. *Trigg*, 641.

10. In an action by B. against M. to recover $1235, deposited by B. with M. to be returned when B. should prove that he paid E. or his authorized agent, the sum of $950, to apply on certain payments to be made by B. to L. in pursuance of certain articles of agreement made and entered into by B. and L.; B. in order to prove the payment of the $950 to E. as agent of L. introduced and read to the jury certain depositions which had been taken in a controversy pending in the probate court between L. and E's administrator, to recover money paid by B. to E. for L.; *Held*, that the depositions having been taken in a case to which B. was not a party, and M. only a party as the agent of L., were inadmissible to prove the payment in the suit between B. and L. *Merrill* v. *Bell*, 730.

PARTNERS AND PARTNERSHIP.

1. Although, as a general rule, one partner cannot sue his copartners at law for a sum of money due on account of the partnership, unless it be the balance of a separate account or a general balance of accounts; yet where several partners execute a note payable to one partner, even though on account of matters connected with the partnership, it is an acknowledgment of a separation of the sum from the partnership account, and the payee may maintain an action at law on the note. *Bonnaffe* v. *Fenner*, 212.

2. In an action of assumpsit brought by B. as the bearer of a note made payable to M. or bearer, for the use of the Real Estate Banking Company of Hinds County, by F. and others; on proof that the makers of the note and the payee were all members of the company for whose use the note was made, *held* that B. might, notwithstanding, maintain his action on the note. *Ib.*

3. Where partners when sued seek to establish the existence of the partnership, they must produce the letters of partnership, or give a legal excuse for their non-production, before the partnership can be proved by other evidence. *Ib.*

4. Where, upon the death of one partner, the survivor assigns to a trustee partnership effects to secure creditors, the administrator of the deceased partner cannot implead the surviving partner and the trustee in the probate court, to compel them to account for the effects thus transferred. *Searles* v. *Scott*, 246.

5. In such case the probate court would have jurisdiction of neither the persons nor the subject-matter. *Ib.*

6. Where articles of partnership, with reference to land are lost, parol evidence of their contents is admissible. *Perry* v. *Randolph*, 335.

7. Whatever the private agreements and contracts of persons, who conduct themselves before the world as partners, may be, with reference to debts contracted by them, and the responsibilities of the partners respect-

Digitized by Google

ively, they will be equally and jointly liable to those dealing with the partnership, for all debts lawfully contracted. *Ib.*

8. In an action by P. against D. & R. as partners in a race-course, for work done on the course, it was in proof that D. & R. had signed articles to establish, carry on, and complete the race-course, at mutual expense and mutual profit, for five years, at the end of which time R. was to pay D. for half the improvements, and be the sole proprietor; D. to superintend the course and the erection of the improvements; but the articles contained the clause, that "they were not to be so construed as to make the parties partners in the contracting of debts;" D. employed P. to do the work on the course: *Held*, that the clause in the articles of agreement, about the contracting of debts, could not operate to the exoneration of R. from the payment of debts contracted by D. for the purposes of the partnership, and that he would be liable to P. for the value of the work done by him upon the course. *Ib.*

9. In an action by P. against D. & R. as the owners, in partnership, of a race-course, for work done on the course, R. denied, under oath, the partnership; and, after proof of a written agreement between D. & R. for the construction of the course, at joint expense and profit, P. offered to prove that, though he was employed by D. to do the work, yet that R. was often present, giving orders and directions concerning it, and shared the profits of the course, after it was completed: *Held*, that the proof was admissible, as tending to establish the partnership in the race-course between D. & R., and their joint liability as partners, for the work done. *Ib.*

10 D. & R. being partners in a race-course, D. sold out his interest to G., who assumed to pay D.'s share of the debts due on account of the course; in an action against D. & R. by P. for work done on the course, *held*, that G. was a competent witness to prove payment by D. to P. for the work done by P., and for the value of which he was suing. *Ib.*

11. Where a debt was contracted with a firm, and one of the partners sued for it in his individual name, declaring on it as a debt due to him, the defendant can avail himself of the fact of the debt having been contracted with the partnership, only by plea supported by affidavit.

Anderson v. *Tarpley*, 567.

12. *Idem*, if a firm sue for a debt due one of the partners; or an executor sue in his individual capacity, for a claim due to his testator. *Ib.*

13. If a claim be placed in the hands of two attorneys practising in partnership, and before any steps are taken in the collection of the claim, the firm dissolve, and one of the members take charge of the claim, and render all the services in its collection, and sue individually the owner of the claim for his fees for so doing, the jury will be justified in inferring that it was part of the contract of dissolution between the partners, that the one who has rendered the services should attend to the claim and receive the compensation, and their verdict to that effect will be upheld. *Ib.*

14. L. filed his bill to be relieved against a judgment at law, recovered

Digitized by Google

against him by M.; he alleged that he was in partnership with C. in erecting a saw mill; that a settlement and dissolution of the firm took place, and C. agreed to pay all the debts, the debt to M. being one of them; that the note on which the judgment was recovered was executed after the settlement, but antedated, and the signature of the firm of L. and C. attached without authority from L.; it was also alleged that M. knew that C. had undertaken to pay all the debts of the firm, and did not object. In an amended bill, it was stated that L. had no knowledge of the material facts set forth in the original bill, until after the judgment at law. M. filed a demurrer to the original and amended bills, which was sustained by the Court below, and the bills dismissed. *Held*, that the bills did not make a sufficient showing for relief in a court of equity, and that the demurrer was properly sustained. *Leggett* v. *Morris*, 723.

PAYMENT.

T. & R., being assignees of a note payable to B., sued the makers thereon at law; the defendant plead payment and a special plea of tender; the substance of which was, that though the note was payable to B. on its face, yet it was in reality the property of the Hernando Bank when made, and was, by agreement, to be paid in the notes of the bank, which notes, for the sum due they had tendered, six months after the maturity of the note, to the assignees. A demurrer to the plea of tender having been sustained and a trial had upon the plea of payment, and verdict and judgment rendered for the amount of the note in favor of the assignees; the defendants, on writ of error to this court, insist upon their right to pay the judgment in the notes of the bank, by which the note was alleged to have been assigned: *Held*, that the defendants below, having permitted the suit there to be conducted by the plaintiffs as assignees of B. without question of their character in that particular by proper plea, had admitted their right to sustain their suit in that character and it could not now be questioned. *Lanier* v. *Trigg*, 641.

PERSONAL PROPERTY.

1. It is a general rule, that in an action for the price of a chattel, the vendee may prove, in defence, deceit on the part of the vendor, and that the article was of no value; or he may show a partial unsoundness in mitigation of damages. *Harmon* v. *Sanderson*, 41.
2. A purchaser cannot, by his own act alone, return and revest the property in the seller, and recover the price paid, on the ground of a total failure of consideration, nor can he by the same means, protect himself from the payment of the price on the same ground. *Ib.*
3. In an action for the price of a chattel, proof that the representations of the seller at the time of the sale were fraudulent, and the article of no value,

Digitized by Google

will alone warrant a verdict for the defendant; however far the evidence may extend in mitigation of damages. *Ib.*

4. Where personal property is sold, not upon a credit, the purchaser cannot take the property or sue for it, without payment or tender of the purchase-money. *Hundley* v. *Buckner*, 70.

PLANTERS BANK.

1. Where, in a subsequent statute, there is no express repeal of a former one, the former statute will not be considered repealed by implication, unless the repugnancy between the new provision and the former one be plain and unavoidable. *The Planters Bank* v. *The State*, 628.
2. In the construction of statutes, the intention of the legislature is the cardinal rule of construction. *Ib.*
3. In 1843, the legislature passed a general law prescribing the mode of proceeding against banks that had violated their corporate franchises, (Acts of 1843, 52–57.) In the same year proceedings in the circuit court were commenced under that act against the Planters Bank. In 1844, the legislature passed another act in relation specially to the Planters Bank and one other bank, authorizing them, upon certain conditions, to surrender their charters; and upon their refusal to do so, making it the duty of the attorney-general and requiring him to proceed by bill in the superior court of chancery against them, have a receiver appointed to take charge of their property and proceed to have them wound up; the law of 1844 provided that if either of the companies should accept and comply with the conditions of the act by a voluntary surrender of its charter, then such bank should be released from the operations of the said law of 1843; the Planters Bank did not accept the conditions of the act of 1844, and the proceedings already instituted in 1843, under the law of that year having progressed to judgment in the circuit court against the bank, that court declaring its charter forfeited, and appointing trustees under the law of 1843 to collect its debts and take charge of its property, the bank appealed to this court, and the cause was here submitted on a preliminary motion as to whether the law of 1844 had not repealed the act of 1843, and taken away the jurisdiction of the circuit court. *Held*, that there was no necessary repugnancy between the two acts, and therefore the latter did not by implication repeal the former; that no proceedings being instituted in the chancery court under the latter act, the circuit court did right to proceed to judgment under the law of 1843. *Ib.*

PLEADING.

1. The plea to an action of assumpsit on a promissory note that the plaintiff was not the lawful owner or bearer of the note sued upon at the time of the commencement of the suit, is bad as amounting to the general issue. *Bingham* v. *Sessions*, 13.
2. A plea to an action on a note, that the note was obtained by duress, setting

Digitized by Google

forth in a detail of circumstances the nature of the duress in the procurement of the note, is not by such detail, even if unnecessary, vitiated. *Ib.*

3. A plea to an action on a note that the note was given to obtain the release of certain property levied on by virtue of a certain execution which was fraudulently issued on a judgment previously satisfied, under which execution the plaintiff threatened to sell the property thus levied on; *held*, to be bad on demurrer. *Ib.*
4. A note given to obtain the release of property from an illegal levy, is not void; the maker has his redress by action against the judgment creditor or the option to give the note; if he elect the latter he is bound by it. *Ib.*
5. A plea to an action on a note that the note was obtained by duress, through the fraudulent levy of an execution by the plaintiff therein, though bad as a plea af duress, should be so amended by the permission of the court, as to allow the defence arising out of the fraud of the plaintiff to be made. *Ib.*
6. A defendant cannot, under the plea of *non assumpsit* merely, avail himself of the defence that the note on which he has sued, has been changed from the note, the execution of which he authorized; such defence is admissible only when the pleadings are under oath. *Hemphill* v. *Bank of Alabama*, 44.
7. By pleading to the merits the defendant waives any objection that may exist as to the character in which the plaintiff has brought the suit. *Ib.*
8. M. conveyed a slave to B. in trust to secure M. R. & Co. a debt; after the execution of this deed of trust, the slave conveyed by it was purchased under an execution against M. by H. on a judgment junior to the deed of trust. B. the trustee sold the slave while in the possession of H. and in the absence of the slave, under the deed of trust to L. R. M.; and thereupon B. instituted an action of detinue for the use of L. R. M. against H. to recover the slave: *Held*, that the action of detinue could not be maintained in the name of one for the use of another, and that therefore the name of the usee in the record was wholly surperfluous, an impertinent allegation, and should be disregarded. *Hundley* v. *Buckner*, 70.
9. Where the declaration against the indorser of a promissory note, in its first count, was in the usual form, but in the second did not aver demand and notice to the indorser, but as excuse for the omission averred that the maker of the note was insolvent; and the defendant plead non assumpsit, and a verdict, without any charge from the court, on proof of the insolvency, was rendered for the plaintiff; and the defendant moved for a new trial, which being refused he embodied the testimony in a bill of exceptions, and brought the case to this court: *Held*, that the statute of jeofails did not preclude this court from examining the case, and granting a new trial for want of sufficient evidence to uphold the verdict. *Reaves* v. *Dennis*, 89.
10. When the declaration fails to make out a case against the defendant, and he instead of demurring pleads to the action, and a verdict and judgment are given against him, it seems that under the statute of jeofails the defect in the pleadings will be cured and the judgment be undisturbed. But *aliter* if

Digitized by Google

the evidence be embodied in the record on the overruling of a motion for a new trial. *Ib.*

11. However defective a plea may be in form, if it be appropriate to the form of action and go to the substance of it, it will be error to strike it out or reject it. *Smith* v. *The Commercial Bank of Rodney*, 83.

12. Special pleas, which amount to the general issue, must be specially demurred to; they cannot be stricken out upon motion. *Ib.*

13. To an action brought by a bank on a note, payable to it by its corporate name, pleas denying the corporate existence of the bank at the time of the execution of the note, and setting up violations of its charter, and asserting a failure of the bank to comply with certain prerequisites of its corporate existence, however defective they may be in form, cannot be stricken out on motion; they must be reached by demurrer. *Ib.*

14. E. and others made a note payable to E., president of the board of trustees, in township three, of range thirteen east, and his successors in office. W., as president of the board of trustees of schools and school lands, of township number three, of range number thirteen east, brought an action on this note against E. and others, and averred in the declaration that by the description of the payee in the note was intended "president of the board of schools and school lands of township three, of range thirteen east;" and that the plaintiff was successor of E. in that office; the declaration was held on demurrer sufficient to maintain the action. *Land* v. *Warner, President of School Lands*, 155.

15. Where a party defendant who has pleaded to the action, dies during the progress of the suit, and his administrators are brought in by *scire facias*, the plea filed during the lifetime of the intestate, will be the plea of the administrators, if they omit to file a plea to the *scire facias*. *Woodhouse* v. *Lee*, 161.

16. Where a declaration against an attorney at law for neglect in suing upon a claim placed in his hands for collection, contains several counts, in some of which the claim is described as a promissory note, in others as a writing obligatory, and the defendant's plea to the whole action, in other respects formal and containing a good bar to the action, will not be defective for describing the claim as a writing obligatory. *Ransom* v. *Cothran*, 167.

17. Our statute directs that the death of the nominal plaintiff, during the pendency of a suit, shall not cause its abatement; but it does not authorize the commencement of a suit in the name of a person no longer in existence. *Humphreys* v. *Irvine*, 205.

18. If the right of a married woman to her distributive portion of a deceased person's estate accrue after marriage, the husband may sue for it alone. *Henderson* v. *Guyot*, 209.

19. Although, as a general rule, one partner cannot sue his copartners at law for a sum of money due on account of the partnership, unless it be the balance of a separate account, or a general balance of accounts; yet where several

Digitized by Google

partners execute a note payable to one partner, even though on account of matters connected with the partnership, it is an acknowledgment of a separation of the sum from the partnership account, and the payee may maintain an action at law on the note. *Bonnaffe* v. *Fenner*, 212.

20. In an action of assumpsit, brought by B., as the bearer of a note made payable to M., or bearer, for the use of the Real Estate Banking Company of Hinds County, by F. and others; on proof that the makers of the note and the payee were all members of the company for whose use the note was made; *held*, that B. might, notwithstanding, maintain his action on the note. *Ib.*

21. In an action of assumpsit by the bearer of a note made payable to "M. or bearer, for the use of the Real Estate Banking Company," it will not be necessary to set out the words stating for whose use the note was made, as they constitute no part of the legal contract. *Ib.*

22. Where, upon the death of one partner, the survivor assigns to a trustee partnership effects to secure creditors, the administrator of the deceased partner cannot implead the surviving partner and the trustee in the probate court, to compel them to account for the effects thus transferred. *Searles* v. *Scott*, 246.

23. In such case the probate court would have jurisdiction of neither the persons nor the subject-matter. *Ib.*

24. Where a bill in chancery sets up an award of arbitrators, and traces the claim of the complainant through it, the award will be held *prima facie* good on *pro confesso*, even though the bill does not aver that the award was made upon notice. *Upsher* v. *Hargrove*, 286.

25. If a plea of *nul tiel corporation*, supported by affidavit, be filed to a declaration by a bank on a note, and issue be joined thereon, and the bank introduce in evidence a copy of the act of its incorporation with proof of user under the charter, it is sufficient to entitle it to recover. *Henderson* v. *Mississippi Union Bank*, 314.

26. Where, to an action on a bond, the defendant pleaded that the bond was given for the hire of a negro for a year, and the negro was taken out of the defendant's possession on a certain day, before the expiration of the hire, by the payee of the bond, to which the plaintiff replied in substance, that the contract of hire was that the plaintiff might at any time take possession of the negro by deducting twelve dollars per month for the unexpired time, and possession had been accordingly taken; to which replication the defendant demurred, and the court overruled the demurrer and gave judgment final against the defendant for the amount due upon the bond after deducting the period of the negro's absence. *Held*, that the judgment final was erroneous; the court should have awarded a judgment with a writ of inquiry. *Grover* v. *Gaunt*, 317.

27. To a declaration on a bond for the payment of money, the defendant plead that the bond was executed for the hire of a negro by the plaintiff to the defendant from January 1st, 1841, to January 1st, 1842, and that the negro

Digitized by Google

during that period, should not be removed from the defendant's possession, yet the plaintiff did, on the third day of May, 1841, take the negro out of the defendant's possession, by which the consideration of the writing obligatory had failed; the plaintiff replied, that when the negro was hired it was agreed between the plaintiff and defendant, that if the plaintiff should want the negro before the first day of January, 1842, the defendant should give her up, deducting twelve dollars per month for the unexpired time; and that the defendant had the negro until the 3d day of June, 1841, *without this* that the plaintiff agreed that the negro should stay the whole year as averred by the defendant. *Held*, on demurrer, that the plea was good in substance and form. *Ib.*

28. If the action be founded on a note, and in the pleadings the word "note" is used, without words of identification, it will be understood of the note mentioned in the previous pleadings. *Ib.*

29. An administrator *de bonis non* can maintain a suit only for those articles which remain unadministered. *Byrd* v. *Holloway*, 323.

30. If an administrator, upon the settlement of his accounts, is indebted to the estate of his intestate, the creditors or distributees may sue for the balance; the administrator *de bonis non* cannot. *Ib.*

31. The plea, to an action to recover for services as physician, that the account had not accrued within three years, is bad. The limitation of three years does not apply to such case. *Hazlip* v. *Leggett*, 326.

32. In an action against the maker of a note payable to a bank by the indorsee of the bank, since the statute of 1840 prohibiting assignments by banks, if the maker of the note desire to avail himself of that statute in his defence, he must do so by plea in abatement: he cannot do so under the general issue. *Ib.*

33. In an action by a physician to recover fees due him, it is not necessary that all the items of his account should be proved; where, however, the proof of the various items is not clearly made out, the physician would strengthen his proof by showing that he kept correct books, and that the account was correctly copied from his books. *Ib.*

34. L., a physician, sued the administrators of G. for medical services rendered, extending from 1836 to 1842, and proved by Dr. M. that he (L.) had attended in the family of G. as physician during his (M's.) absence who was G's. regular physician; that he knew nothing of the particular visits and prescriptions charged, but had seen L. two or three times at the house of G.; that he had heard G. in his lifetime frequently say that in the absence of witness he had employed L.; and he had two or three times been called in consultation with L. at G's. house, over some of his sick family. *Held*, that the evidence was not sufficient to entitle L. to recover on the account. *Ib.*

35. Upon demurrer to a plea *puis darrien continuance* being sustained, the judgment of the court under the statute (H. & H. 615, § 8.) should be *respondeat ouster*, and not *quod recuperet*. *McDugald* v. *The Union Bank*, 333.

Digitized by Google

36. The administrators of a deceased person, at the sale of his personal property, proclaimed that the slaves about to be sold were subject to judgment liens, and offered and agreed that in case they should be seized under the judgments, the sale should be considered as void, and the notes of the purchasers be given up; the slaves accordingly sold for their full value; in an action brought by the administrators on a note given for the purchase-money, *held*, that the makers of the note might show, under the general issue, that the slaves, for the price of which the note was given, were taken out of their possession and sold by judgments against the estate, and that the consideration of the note had thus failed. *Buckles* v. *Cunningham*, 358.

37. He who wishes to avail himself of a contract containing conditions precedent on his part to be performed, in pleading must plead performance of those conditions precedent, and in making proof must prove performance of them. *Fultz* v. *House*, 404.

38. The plea of set-off to an action of assumpsit does not exist in this state, and if pleaded is a nullity. *Henry* v. *Hoover*, 417.

39. Under the statute of this state the right of set-off exists, and may be made available under the plea of payment. *Ib.*

40. In an action of assumpsit, the defendant plead a special plea of set-off, which was the only plea pleaded; the plaintiff took issue upon it, and a verdict was rendered thereon and judgment given accordingly. *Held*, that the mispleading was cured by the verdict, and that the verdict and judgment should not be disturbed. *Ib.*

41. W. and others, distributees of the estate of M., filed a bill in the probate court against P. and others, as the sureties of S. M. on her administration bond of M.'s estate, S. M. having intermarried with B. and removed with the property of the intestate out of the state; the object of which was to compel B. and his wife to account for the property; the amount due the complainants to be decreed to them and the bond declared forfeited and put in suit. P. plead that by a former decree of the probate court a proceeding against him as administrator of M., which office he once filled conjointly with S. M., but had afterwards resigned, for the same matter and to the same effect with the present, had been dismissed by the court; this plea was sustained by the court below, and the bill dismissed as to P. *Held*, that the plea was improperly sustained, P. having in the two proceedings been impleaded in different characters; in one as administrator, and in the other as a surety of the administratrix. *Washburn* v. *Phillips*, 425.

42. Is not a bill in the probate court by the distributees of an estate against an administrator and his sureties on his official bond to have an account of what is due by the administrator taken and to have his official bond declared forfeited and put in suit, liable to demurrer for multiplicity of parties? *Quære?* *Ib.*

43. A special plea of set-off in an action of assumpsit may properly be treated as a nullity. Yet if it be demurred to, the demurrer must be disposed of, or it will be error. *Anderson* v. *Burke*, 475.

Digitized by Google

44. Where a plea of set-off to an action of assumpsit is filed and demurred to, however technically correctly it may be pleaded, the plea being such as, from its intrinsic nature, a judgment according to law cannot be given sustaining it, the demurrer must be sustained. *Ib.*

45. A. being sued by B. in assumpsit for wages due B. as overseer for A., plead a special plea of set-off in effect that B. was indebted to A. in the sum of one thousand dollars, and had promised to pay it in consideration of the death of A.'s slave, caused by B. To this plea B. demurred; *held*, that the demurrer was properly sustained. *Ib.*

46. Where a debt was contracted with a firm, and one of the partners sued for it in his individual name, declaring on it as a debt due to him, the defendant can avail himself of the fact of the debt having been contracted with the partnership, only by plea supported by affidavit. *Anderson* v. *Tarpley*, 507.

47. *Idem*; if a firm sue for a debt due one of the partners; or an executor sue in his individual capacity for a claim due to his testator. *Ib.*

48. The charter of a bank contained no provision which in so many words required the bank at all times to pay specie; by its charter the capital stock was to be paid in gold or silver, or the notes of specie-paying banks; and the bank was prohibited from issuing notes to a greater amount than three times the amount of the capital stock paid in; by another section of the charter it was provided that if the bank refused to pay its notes on demand, the holder might demand an interest of twelve and a half per cent. per annum on such notes, the payment of which had been refused. In a proceeding by *quo warranto* against the bank, it was alleged, as cause of forfeiture, that the bank on the first day of November, 1841, and on divers other days before and since, did refuse, on demand being made at its counter in its banking-house during the regular hours for doing business, to redeem in specie or other lawful money of the United States, the notes, bills, bonds and other liabilities issued by said bank, and then due: *Held*, on demurrer, that the cause of forfeiture was sufficiently pleaded, and the demurrer must be overruled. *Commercial Bank of Natchez* v. *The State*, 599.

49. In a proceeding against a bank for forfeiture of charter, alleging as cause of forfeiture a suspension of specie payments, the answer of the bank, that it paid all its notes and liabilities except certain checks which it had drawn on another bank, for payment of which provision had been made with that bank, but it failed to pay them, and they were returned; and on being returned, the bank which issued them was unable to take them up at the time, but in two years afterwards, and before the commencement of any proceedings against it, it resumed specie payment on those checks and all other liabilities, whenever payment was demanded at its counter, and was then paying specie, was *held* not to be a sufficient answer to the charge of forfeiture, and no excuse for the suspension. *Ib.*

50. L. being sued on a bond due in May, 1840, which was payable in the

Digitized by Google

notes of a particular bank, plead that on the 18th day of November, 1840, he tendered the amount in bills of the bank to the plaintiff, and that he brought the sum due, with interest, in the notes of the bank into court, ready to be paid to the plaintiff. *Held*, on demurrer that the plea was bad. *Lanier* v. *Trigg*, 641.

51. A plea of tender must aver a continual state of readiness to pay the sum due, since the tender; for although the defendant may not be able to show the truth of the averment, yet its introduction enables the plaintiff to show, if the fact be so, that upon a subsequent demand the defendant had failed to pay, which would defeat the defence. *Ib.*

52. Where a note is payable, or belongs to a bank, and has been assigned by such bank, since the act of 1840, prohibiting assignments by banks of their notes and other evidence of debt, in an action upon such assigned note, the only mode of the defendant's availing himself of the defence is by plea in abatement. *Ib.*

53. T. & R., being assignees of a note payable to B., sued the makers thereon at law; the defendant plead payment and a special plea of tender; the substance of which was that though the note was payable to B. on its face yet it was in reality the property of the Hernando Bank when made, and was by agreement to be paid in the notes of the bank, which notes, for the sum due they had tendered, six months after the maturity of the note, to the assignees. A demurrer to the plea of tender having been sustained and a trial had upon the plea of payment, and verdict and judgment rendered for the amount of the note, in favor of the assignees; the defendants on writ of error to this court, insist upon their right to pay the judgment in the notes of the bank by which the note was alleged to have been assigned: *Held*, that the defendants below having permitted the suit there to be conducted by the plaintiffs as assignees of B. without question of their character in that particular by proper plea, had admitted their right to sustain their suit in that character and it could not now be questioned. *Ib.*

POSSESSION.

1. Under a joint conveyance the possession of one will be deemed the possession of both, unless there were an ouster. *James* v. *Rowan*, 393.

2. In an action of trover for a note payable to bearer the possession by the defendant of the note, will be *prima facia* evidence of his ownership, which will not be rebutted by proof that the note formerly belonged to the plaintiff. *Smith* v. *Prestige*, 478.

3. It seems it would be otherwise if the note were payable to order and not indorsed. *Ib.*

4. Where a holder sues on a note and his title is properly questioned, he must make out his title; but when the holder is sued for a note payable to bearer, his possession will be a sufficient protection, until a better title is shown. *Ib.*

Digitized by Google

PRACTICE.

1. A defendant cannot, under the plea of non assumpsit merely, avail himself of the defence that the note on which he has sued has been changed from the note, the execution of which he authorized; such defence is admissible only when the pleadings are under oath. *Hemphill* v. *Bank of Alabama*, 44.

2. Whether an action can be maintained in the courts of Mississippi, by the bearer on a note payable to bearer; which note was made in the state of Alabama, where a statute provides that no one can maintain an action as the bearer of a promissory note? *Quære? Ib.*

3. Where a defence is based upon the provisions of a statute of another state, the statute, in order to make the defence available, must be produced and proved. *Ib.*

4. By pleading to the merits the defendant waives any objection that may exist as to the character in which the plaintiff has brought the suit. *Ib.*

5. Where a jury, in the trial of an action for assault and battery, after having retired to make up their verdict, agreed, immediately upon entering into the jury room, that each should put down a sum which should be divided by twelve, and that the result should give the amount of damages to be found by their verdict; and this agreement was carried out and acted on; *held*, that the verdict so found was irregular and should be set aside. *Parham* v. *Harney*, 55.

6. Whether the affidavits of jurors to establish the conduct of the jury while in the jury room are admissible, on a motion for a new trial? *Quære? Ib.*

7. In a suit in chancery against both adult and infant defendants, a decree rendered in favor of the complainants against all the defendants upon *pro confesso* against the adult defendants, and the answer of guardians *ad litem* for the infants, without any proof, will be erroneous as to the infants, even though time be reserved in the decree to the infants, after they come of age, to show cause against it. *Hargrove* v. *Martin*, 61.

8. Taking a case for confessed in equity, entitles the complainant to a decree only against the party as to whom the bill has been taken for confessed; not against the others; and if the defendant against whom no *pro confesso* is taken, disprove the bill, the whole will be dismissed. *Ib.*

9. Where a decree has been rendered in the chancery court in a suit against adults and infants on *pro confesso* against the former, without proof, and this court on that account reverse the decree, the *pro confesso* as to the adults will not thereby be set aside. The cause will proceed as if no decree had been pronounced. *Ib.*

10. Where a deed was read without objection in the court below, the certificate of record of which was made by the deputy of the probate clerk, this court would not lend a willing ear to that objection raised here for the first time. *Hundley* v. *Buckner*, 70.

11. It seems that where an objection is taken to the insertion of the name of an usee in the record, such objection should be made in the court below where it might easily be remedied. *Ib.*

Digitized by Google

12. Where personal property is sold not upon a credit, the purchaser cannot take the property or sue for it, without payment or tender of the purchase-money. *Ib.*

13. Where the payee of a joint note, the makers of which reside in different counties, sues them all in a joint action in a county where one of them lives, and by writs to the different counties brings them all before the court of the county where the suit is instituted; and the maker residing in that county pleads to the action while the others make default, the holder of the note may discontinue his suit as to that maker, and may take judgment by default final against the others. *Read* v. *Renaud*, 79.

14. However defective a plea may be in form, if it be appropriate to the form of action, and go to the substance of it, it will be error to strike it out or reject it. *Smith* v. *The Commercial Bank of Rodney*, 83.

15. Special pleas which amount to the general issue, must be specially demurred to; they cannot be stricken out upon motion. *Ib.*

16. To an action brought by a bank on a note payable to it by its corporate name, pleas denying the corporate existence of the bank at the time of the execution of the note, and setting up violations of its charter, and asserting a failure of the bank to comply with certain prerequisites, of its corporate existence, however defective they may be in form, cannot be stricken out on motion, they must be reached by demurrer. *Ib.*

17. L. sued S. & H. and P. & M. upon a joint note; M. died during the progress of the suit and before judgment; whereupon L. having brought the administrators of M. before the court by *sci. fa.* dismissed the suit as against the other parties and took judgment against the administrators of M.; *Held*, that the proceedings were regular and proper. *Woodhouse* v. *Lee*, 161.

18. A plaintiff in an action upon a joint note may discontinue the suit as to any one or more of the defendants and proceed to judgment against the others. *Ib.*

19. Where a party defendant who has pleaded to the action dies during the progress of the suit and his administrators are brought in by *sci. fa.*, the plea filed during the life time of the intestate, will be the plea of the administrators, if they omit to file a plea to the *scire facias*. *Ib.*

20. A judgment *non obstante veredicto* cannot be rendered after a judgment upon the verdict has been entered, the rule on that subject is, that the motion for such judgment (*non obstante veredicto*) must be made immediately after the verdict, and before a judgment is rendered on it. *The State* v. *The Commercial Bank of Manchester*, 218.

21. It is error for the circuit court after several pleas have been filed, two verdicts rendered, and new trials granted, on motion, to set aside the service of the writ in the case and give a final judgment for the defendant. *Wooten* v. *Wingate*, 271.

22. Upon motion to dismiss an attachment, the court cannot look beyond the face of the bond itself; if it be valid upon its face, that is sufficient. *Spear* v. *King*, 276.

Digitized by Google

23. If an attachment bond be signed by A. as agent for the attaching creditor, and be in other respects regular, the court cannot on motion to dismiss the attachment, inquire into the question as to the agency of A. *Ib.*

24. Where the demurrer to a bill is overruled and the defendant allowed ninety days in which to answer; and the complainant die before the next term of the court, and the bill is revived at that term in favor of the administrator of the complainant; and on the same day of the revival, the defendant having failed to answer, the bill is taken for confessed against him, and a decree entered accordingly, it will be error; the defendant should have been allowed some day for the purpose of answering the bill of revivor. *Upshur* v. *Hargrove*, 286.

25. Where a case has been submitted to a jury and they have retired to consider of their verdict, it will be error for the court, without the consent of the parties, to explain at the request of the jury, a matter of law to them bearing upon the case, upon which they notified him they had doubts. *Taylor* v. *Manley*, 305.

26. Where, to an action on a bond, the defendant pleaded that the bond was given for the hire of a negro for a year, and the negro was taken out of the defendant's possession on a certain day, before the expiration of the hire, by the payee of the bond, to which the plaintiff replied in substance, that the contract of hire was that the plaintiff might at any time take possession of the negro by deducting twelve dollars per month for the unexpired time; and possession had been accordingly taken; to which replication the defendant demurred, and the court overruled the demurrer and gave judgment final against the defendant for the amount due upon the bond, after deducting the period of the negro's absence: *Held*, that the judgment final was erroneous; the court should have awarded a judgment with a writ of inquiry. *Grover* v. *Gaunt*, 317.

27. In plenary proceedings by bill in the probate court against an administrator, it is premature to enter a decree without taking the bill for confessed. *Washburn* v. *Phillips*, 425.

28. A special plea of set-off in an action of assumpsit may properly be treated as a nullity. Yet if it be demurred to, the demurrer must be disposed of, or it will be error. *Anderson* v. *Burke*, 475.

29. When a judgment of forfeiture has been rendered against a bank in proceedings under the act of 1843, and trustees have been appointed by the court rendering the judgment, all suits pending in the name of the court whether at law or in equity, may be revived at the instance and in the name of the trustees, and the action will progress in the name of the trustees, in the same manner and to the same effect that a suit is revived in the name of an executor or administrator, which was pending in the lifetime of the testator or intestate. *Nevitt* v. *Bank of Port Gibson*, 513.

30. The act of 1843, in its 9th, 10th and 11th sections, directing the trustees to proceed to collect the debts and property of the bank for the benefit of credit-

Digitized by Google

ors, to be applied as thereafter directed by law, constitutes the property of the bank a trust fund for the benefit of creditors, which no subsequent legislation can appropriate otherwise, and if the legislature fail to direct the mode of distribution among the creditors, a court of chancery will execute the trust. *Ib.*

31. A judgment of forfeiture against a bank and appointment of trustees under the act of 1843, is an assignment by operation of law, of all the property of the bank to the trustees for the benefit of creditors, which relates back to the period of the issuance of the injunction against the bank under the act, and preserves the assets and property of the bank from that time, for the benefit of the creditors. *Ib.*

32. A judgment of forfeiture against a bank under the act of 1843, has none of the common law consequences of a judgment of forfeiture; the legislature having waived its right to the common law penalties by providing that concurrently with the judgment of forfeiture, the assets and property of the bank shall vest in trustees for the benefit of creditors of the bank. *Ib.*

33. In a proceeding against a corporation, as such, for forfeiture of charter, the performance of conditions precedent to the existence of the corporation cannot be inquired into; its existence as a corporation is admitted by the proceedings against it. *Commercial Bank of Natchez* v. *The State*, 599.

PRESIDENT OF SCHOOL LANDS.

E. and others made a note payable to E., president of the board of trustees in township three, of range thirteen, east, and his successors in office. W., as president of the board of trustees of schools and school lands of township number three, of range number thirteen, east, brought an action on this note against E. and others, and averred in the declaration, that by the description of the payee in the note, was intended "President of the board of schools and school lands, of township three, of range thirteen, east;" and that the plaintiff was successor of E. in that office; the declaration was held on demurrer sufficient to maintain the action. *Land* v. *Warner*, 155.

PRINCIPAL AND AGENT.

1. He who signs a bill or note in blank and delivers it to another, makes that person his agent, and authorizes him to fill it up with an indefinite amount. *Hemphill* v. *Bank of Alabama*, 44.

2. But if such agent be limited in his authority, and fill up the note with an amount exceeding his limit, the note will, in the hands of a person who has received it with a knowledge that the authority was limited, be void as to the excess. *Ib.*

3. C. being sued upon three notes made by an agent, plead non assumpsit with an affidavit of its truth, and that the notes were not made by him. The plaintiff on the trial read a power of attorney from C. to the agent,

Digitized by Google

authorizing him to purchase goods for C. to keep up a mercantile establishment owned by C., either for cash or on a credit, and to execute the notes of C. for that purpose. After the introduction of the power of Attorney, the plaintiff, without other proof of the execution of the notes sued on, read them *without objection* on the part of the defendant, to the jury: *Held*, that by permitting the notes to be thus read without objection the defendant waived further proof of their due execution, and could not, on motion for a new trial, or in this court object to a verdict against him on the ground that the notes had been improperly admitted in evidence. *Carter* v. *Taylor*, 367.

4. It is requisite, before a principal can be held bound by the acts of his limited agent, not only to prove the agency but also to prove that the act was done within the scope of that limited agency; thus where in an action against the principal on a note made by his agent, it is proved that agent was authorized to execute the notes of his principal in the purchase of goods for the store of the principal, it must also be proved before the principal will be liable, that the notes were actually executed in the purchase of such goods. *Ib.*

5. And if, in an action on such notes, the defendant, on proof of the execution of the power of attorney, permit the notes, without objection, to be read in evidence to the jury, it will be a tacit admission on his part that the notes were duly executed by the agent in the proper purchase of merchandise, and he will not be heard on a motion for a new trial, or in this court, objecting that such proof was not made, and that the notes were therefore inadmissible in evidence. *Ib.*

PRINCIPAL AND SURETY.

1. A mere voluntary engagement to indulge the principal debtor, will not discharge the surety. *Payne* v. *The Commercial Bank of Natchez*, 24.

2. There must be a positive and binding agreement between the creditor and principal debtor, based upon some new and valuable consideration, sufficient to tie up the creditor, and prevent him from asserting any remedy, during the time for which the indulgence has been given, against the principal, in order to effect a release of the surety. *Ib.*

3. L. being indebted to the Commercial Bank, in various notes, upon which he was liable, either as indorser or maker, and on which other persons were sureties for him, to reduce his liabilities to a single amount, proposed to the cashier of the bank to execute his individual note for the sum total due the bank, and confess a judgment, in Louisiana, on the note thus made, which judgment should bind all his property, and be in discharge of the notes on which he was liable; the cashier, on consultation with several of the directors, agreed to the arrangement, to be consummated when L. had, at his own expense, carried the arrangement into effect, and exhibited to the bank satisfactory evidence of it. L. after this agreement, and before he

Digitized by Google

confessed the judgment, sold all of his property in Louisiana which the judgment was to bind, to B., and then executed his note for the sum total due the bank, and confessed the judgment, as agreed upon: *Held*, that the agreement of the bank, being purely conditional, and that condition not being complied with by L., the bank might disregard the arrangement with L. and sue upon the original notes against all the parties to them. *Ib.*

4. A creditor who takes collateral security for his debt, is bound to hold it impartially and justly; and if it be lost by his negligence or improper conduct, the surety on such debt may bar the creditor of so much of his demand as he might have received from such collateral. *Ib.*

PRINTER.

1. The sureties on a tax collector's bond are not liable to the publishers of a newspaper, for the payment of the costs of advertising the sales of property by the tax collector for taxes in such paper; notwithstanding the law makes it his duty to advertise his sales in a newspaper. *Brown* v. *Phipps*, 51.
2. Tax collector's bonds, the conditions of which are to collect and pay into the county and state treasury all the state and county taxes, and to do and perform all the other duties which pertain to their office, are not securities for any services rendered to the state by individuals; but for the state and county only. *Ib.*
3. In action against the sheriff by the publisher of a newspaper, to recover of him the cost of his advertisements of sheriff's sales; the advertisement of such sales, though signed by the deputy sheriff, will be evidence against the sheriff. *Terral* v. *McRae*, 136.

PROBATE COURT.

1. Where an issue has been made up in the probate court, and sent to the circuit court for trial before a jury upon the rendition of the verdict, the issue must be sent back to the probate court for judgment; and if the circuit court undertake to render a judgment upon such verdict, that judgment will be a nullity. *Wallace* v. *Wingate*, 151.
2. Where a circuit court has rendered a judgment upon a verdict on an issue from the probate court, no appeal or writ of error will lie from such judgment, it being a nullity; and if one be prosecuted, it will be dismissed. *Ib.*
3. If the probate court, after the trial of an issue from it in the circuit court, refuse to grant a new trial, the whole proceedings may be brought up to the high court of errors and appeals for revision in all their parts. *Ib.*
4. C. & H. filed a petition in the probate court against W. C., alleging that W. C. and themselves were jointly administrators *ad colligendum* on the estate of S. C., and that W. C. had in his possession property of the estate, which he claimed as his own, and refused to allow it to be inventoried; and prayed that he might be required to inventory it; W. C. filed a plea to the

Digitized by Google

jurisdiction of the probate court; *held*, that the probate court should entertain jurisdiction of the petition; and W. C. might have an issue to the circuit court for the investigation of his claim to the property in his possession. *Compton* v. *Compton*, 194.

5. *Aliter*, if W. C. had been a stranger to the administration. *Ib.*

6. The probate courts in this state have no power to appoint a receiver in any case. *Searles* v. *Scott*, 246.

7. Where, upon the death of one partner, the survivor assigns to a trustee partnership effects to secure creditors, the administrator of the deceased partner cannot implead the surviving partner and the trustee, in the probate court, to compel them to account for the effects thus transferred. *Ib.*

8. In such case the probate court would have jurisdiction of neither the persons nor the subject-matter. *Ib.*

9. A sale, by order of the probate court, of the real estate of a decedent must be made in strict compliance with the law, by issuing citation and advertising, or it will be void, and the records of the proceedings may be offered to show that the rules of law in those respects have not been strictly observed. *Laughman* v. *Thompson*, 259.

10. It must appear from the records of the probate court, in cases of the sale of lands by an administrator under its order, that legal notice has been given to the heirs at law, or a legal reason in excuse of the want of such notice, or both the order and the sale are void. *Ib.*

11. In the absence of the record of the proceedings of the probate court touching the sale of a decedent's realty, the action of that court will be presumed to have been correct; when the record, however, is produced it must show affirmatively that everything necessary to give the court jurisdiction was performed. *Ib.*

12. When third persons are made parties to a widow's application for dower in her deceased husband's realty, in the probate court, and contest her right, the consent of the parties thereto, will not give that court jurisdiction of the subject-matter, and the rights of the parties thus illegally before the court will remain the same as if no decision had been made affecting them. *James* v. *Rowan*, 393.

13. Where a deed was made to J. and his sister, conveying a tract of land to them jointly; on the application of the widow of J. for dower in the land thus conveyed, his sister being in possession; *held*, that the legal title in J. by the deed in the absence of proof of an ouster, or that the possession of the sister was adverse, entitled his widow to dower, as against his representatives, in the land; nor could the probate court enter upon the inquiry as to whether J. was a trustee for his sister who had paid the purchase-money for the land; that inquiry and any other affecting his sister's title to the land, or the rights of other persons may be presented when the widow attempts to enforce her allotment of dower. *Ib.*

14. A suit upon an administrator's bond cannot be maintained in the probate court. The remedy thereon is at law. *Washburn* v. *Phillips*, 425.

Digitized by Google

15. The application to the probate court to have an administrator's bond declared forfeited, and for leave to put in suit, is intended by the statute to be *ex parte* in its character; and the sureties on the bond have no right to contest their liability in that stage of the proceeding. *Ib.*

16. As a general rule, the probate court should, on application, allow the administrator's bond to be put in suit; the instances are few in which the leave should be refused. *Ib.*

17. W. and others distributees of the estate of M., filed a bill in the probate court against P. and others, as the sureties of S. M. on her administration bond of M.'s estate. S. M. having intermarried with B. and removed with the property of the intestate out of the state. The object of which was to compel B. and his wife to account for the property; the amount due the complainant's to be decreed to them and the bond declared forfeited and put in suit. P. plead that by a former decree of the probate court a proceeding against him as administrator of M., which office he once filled conjointly with S. M., but had afterwards resigned, for the same matter and to the same effect with the present, had been dismissed by the court; this plea was sustained by the court below, and the bill dismissed as to P.: *held*, that the plea was improperly sustained: P. having in the two proceedings been impleaded in different characters, in one as administrator, and in the other as a surety of the administratrix. *Ib.*

18. In plenary proceedings by bill in the probate court against an administrator, it is premature to enter a decree without taking the bill for confessed. *Ib.*

19. As a general rule, when the probate court has conferred letters of administration, it cannot remove the incumbent, unless for some defined statutory cause. *Muirhead* v. *Muirhead*, 451.

20. Where the widow of the intestate has applied for letters of administration on her husband's estate, and his son, by a former marriage, has made a like application, an affidavit by the son for a continuance of the application on the ground of the absence of a witness who could prove that a short time previous to the widow's marriage to the intestate, she was living with another man as husband and wife, will not constitute a legal showing for a continuance. The affidavit should also state that the individual charged to have been the first husband of the widow was alive at the time of her intermarriage with the intestate. *Ib.*

21. Where the widow of an intestate told his son, in conversation, that she waived her right of administering on her husband's estate, and told him to take out letters, which he did; *held*, that these declarations not made in course, would not preclude the widow from changing her mind at any time within the period allotted by law, and asserting her right to the grant of administration to herself. *Ib.*

22. It is not competent for the probate court to adjudicate on conflicting rights in proceedings for dower; the parties contesting the right must be left to their appropriate legal remedies after an allotment has been made. *Ware* v. *Washington*, 737.

Digitized by Google

PROCESS.

1. It is error for the circuit court, after several pleas have been filed, two verdicts rendered, and new trials granted, on motion, to set aside the service of the writ in the case, and give a final judgment for the defendant.

Wooten v. *Wingate*, 271.

2. If the process in attachment, by mistake of the justice, recited that the *plaintiffs* were concealing their effects, &c., instead of the defendants, and the bond and affidavit contained correct recitals, the court will look to the whole record and not construe it so as to defeat its own end.

Lovelady v. *Harkins*, 412.

3. By the law regulating the territory of Mississippi before it was made a state, chancery jurisdiction was conferred on the supreme court; which was a court of general jurisdiction and the sheriff its officer, who was bound by law to execute its process. Where therefore a bill was filed in that court against adults and infants to foreclose a mortgage, and the process which was directed to the defendants, commanding them to appear and answer, was returned "*served*" by the sheriff, and a decree rendered thereon; *held*, that the process and return were sufficient to uphold the decree.

Smith v. *Bradley*, 179.

4. Where there has been a defective return upon process, it is a question of error or not in the rendering of the decree, and that decree cannot, on account of such defective return, be attacked collaterally in an action of ejectment against parties claiming under the decree. *Ib.*

PRO CONFESSO.

1. Where a bill in chancery sets up an award of arbitrators, and traces the claim of the complainant through it, the award will be held *prima facie* good, on *pro confesso*, even though the bill does not aver that the award was made upon notice. *Upshur* v. *Hargrove*, 286.

2. Where the demurrer to a bill is overruled, and the defendant allowed ninety days in which to answer; and the complainant die before the next term of the court, and the bill is revived at that term in favor of the administrator of the complainant; and on the same day of the revival, the defendant having failed to answer, the bill is taken for confessed against him, and a decree entered accordingly, it will be error; the defendant should have been allowed some day for the purpose of answering the bill of revivor. *Ib.*

PUBLIC POLICY.

It is the policy of our state to prevent free persons of color remaining in it, nor does that policy conflict with the constitution of the United States, which declares "that the citizens of each state shall be entitled to all the

Digitized by Google

privileges and immunities of citizens in the several states;" as no person of color can become a citizen in the sense of the term used in the constitution.
Leech v. *Cooley*, 93.

PUBLICATION.

In order to authorize a publication against a non-resident defendant to a suit in chancery, it must appear in the record, by affidavit, that such defendant is a non-resident of the state; an affidavit, therefore, merely that he is a citizen of a different state will not be sufficient.
McKiernan v. *Massingill*, 375.

PURCHASER WITHOUT NOTICE.

1. A vendor of land who takes no separate or other security for the purchase-money, retains a lien upon the land for its payment; and none but *bona fide* purchasers, without notice, can set up an implied waiver of this equitable mortgage. *Upshur* v. *Hargrove*, 286.
2. To constitute a *bona fide* purchaser, without notice, the party must have advanced a new consideration, or have relinquished some security for a pre-existing debt. *Ib.*
3. U. purchased a tract of land of H., and agreed to pay for it with other lands if title could be had to them: if not, with a stipulated sum; upon which H. conveyed the land to U.'s wife; the title to the other lands not being made, H. filed his bill against U. and wife to subject the land sold by him, to the payment of the stipulated sum, the purchase-money thereof: *Held*, that the land was subject to the vendor's lien. *Ib.*

QUO WARRANTO.

1. Where, in a proceeding by information in the nature of a *quo warranto* against a bank, the court was asked to charge the jury that if they believed from the evidence that the cashier or teller or clerks of the bank, as officers and agents of the bank, received either directly or indirectly from any one the notes of non specie-paying banks, in payment for any part of the capital stock of the bank, they must find for the plaintiff; it was *held*, that the charge was too broad; that to make a payment binding on a corporation, it should be made to some agent authorized to receive it; and that the charge as asked, was properly rejected. *The State* v. *The Commercial Bank of Manchester*, 218.
2. In a proceeding against a bank by information in the nature of a *quo warranto*, the acts of the cashier when proved will be *prima facie* binding on the bank, when performed in the discharge of the ordinary duties which belong to that officer, and in order to avoid such acts of the cashier, it devolves upon the corporation to show a special restriction imposed upon the cashier by the directors. *Ib.*
3. Where, in an information in the nature of a *quo warranto* against a bank,

Digitized by Google

the court was asked to charge the jury, that "if they believed from the evidence that it was agreed between the cashier of the bank and M., a holder of part of the capital stock of the bank, that he should, to make payment of his stock and evade the charter of the bank, procure the notes of the bank, which was then a non specie-paying bank; that the cashier should receive the notes, count out their amount in specie, and immediately take or receive back said specie, without M. being at liberty to take the same away from the bank, and that he should thereupon receive a certificate of stock; and that said M. did so pay an instalment on his stock, and receive a certificate, they must find for the plaintiff; there being proof that the board of directory had given positive directions that nothing but gold or silver, or the notes of specie-paying banks should be received in payment of stock; it was *held*, that the charge, as asked, was properly refused, not having reference to the testimony before the jury. *Ib.*

4. The sixth section of the act of 1843, prescribing the mode of procedure against banks which have forfeited their charters, which authorizes the issuance of an injunction against the bank, to restrain it from the collection of its debts, is constitutional only when taken in connection, and regarded as part of the same law with the 9th, 10th and 11th sections of the act, and which provide for the collection and preservation of the debts and assets of the bank for the benefit of creditors.

Nevitt v. *The Bank of Port Gibson*, 513.

5. The act of 1843, in its 9th, 10th, and 11th sections, directing the trustees to proceed to collect the debts and property of the bank for the benefit of creditors, to be applied as thereafter directed by law, constitutes the property of the bank a trust fund for the benefit of creditors, which no subsequent legislation can appropriate otherwise; and if the legislature fail to direct the mode of distribution among the creditors, a court of chancery will execute the trust. *Ib.*

6. A judgment of forfeiture against a bank, and appointment of trustees under the act of 1843, is an assignment by operation of law, of all the property of the bank to the trustees for the benefit of creditors; which relates back to the period of the issuance of the injunction against the bank under the act, and preserves the assets and property of the bank from that time, for the benefit of the creditors. *Ib.*

7. A judgment of forfeiture against a bank, under the act of 1843, has none of the common law consequences of a judgment of forfeiture; the legislature having waived its right to the common law penalties, by providing that concurrently with the judgment of forfeiture, the assets and property of the bank shall vest in trustees for the benefit of creditors of the bank. *Ib.*

8. The charter of the Commercial Bank of Natchez provided that no person, firm or corporation, should in the original subscriptions for stock, on any one day, subscribe directly or indirectly, or procure any other person to subscribe, with the understanding that it should be transferred after the books were closed, for more than fifty shares of stock; in a proceeding by *quo warranto*

Digitized by Google

against the bank, it was alleged, as ground of forfeiture, that more than fifty shares had been subscribed for, in violation of that section of the charter, and that the stock had been afterwards transferred: *Held*, that these subscriptions for stock being under the superintendence of eight commissioners named in the charter, and under their supervision, and before the bank had a corporate existence, the bank, as such, would not be held responsible for the violation of law of those commissioners who were the agents of the state. *Commercial Bank of Natchez* v. *The State*, 599.

9. *Bona fide* subscriptions to stock in a bank cannot be affected by irregularities which occurred in the subscriptions for stock preliminary to the organization of the bank, made under the supervision of agents of the state, appointed for the purpose of organizing the bank. *Ib.*

10. It was provided in the charter of a bank, that "should any stockholder refuse or fail to pay any instalment on his stock when called for, the company shall sell said stock, on giving thirty days' notice in some gazette, on account of, and at the risk of the stockholder." *Held*, that failure on the part of the bank to comply with this provision, was not a cause of forfeiture of the charter of the bank; the authority to sell the stock was a mere cumulative remedy given to the corporation to enable it to coerce the payment of stock in a more speedy manner than by action at law. *Ib.*

11. A refusal by a bank, on proper application, to pay its notes, bills, bonds and other liabilities issued by the bank, in specie, is a cause of forfeiture of the charter of such bank. *Ib.*

12. The charter of a bank contained no provision which in so many words required the bank at all times to pay specie; by its charter the capital stock was to be paid in gold or silver, or the notes of specie-paying banks; and the bank was prohibited from issuing notes to a greater amount than three times the amount of the capital stock paid in; by another section of the charter it was provided that if the bank refused to pay its notes on demand, the holder might demand an interest of twelve and a half per cent. per annum on such notes, the payment of which had been refused. In a proceeding by *quo warranto* against the bank, it was alleged, as cause of forfeiture, that the bank, on the first day of November, 1841, and on divers other days before and since, did refuse, on demand being made at its counter in its banking house, during the regular hours for doing business, to redeem in specie or other lawful money of the United States, the notes, bills, bonds, and other liabilities issued by said bank, and then due: *Held*, on demurrer, that the cause of forfeiture was sufficiently pleaded, and the demurrer must be overruled. *Ib.*

13. In a proceeding against a bank for forfeiture of charter, alleging as cause of forfeiture, a suspension of specie payments, the answer of the bank that it paid all its notes and liabilities except certain checks which it had drawn on another bank, for payment of which provision had been made with that bank, but it failed to pay them, and they were returned; and on being returned, the bank which issued them was unable to take them up at the

Digitized by Google

time, but in two years afterwards, and before the commencement of any proceedings against it, it resumed specie payment on those checks and all other liabilities, whenever payment was demanded at its counter, and was then paying specie, was *held* not to be a sufficient answer to the charge of forfeiture and no excuse for the suspension. *Ib.*

14. How far a mere temporary suspension of specie payments will work a forfeiture of charter, and what is a *temporary* suspension? *Quære? Ib.*

15. In the year 1840, a bank chartered previously, being in a state of suspension of specie payments, the legislature passed a law that all the banks in the state by the first of April, 1840, should pay their fives in specie; by the first of July their tens; by the first of October their twentys, and by the first of January, 1841, their other notes and debts: *Held*, that this act was constitutional and valid; and a failure on the part of the bank to comply with the provisions of the law would work a forfeiture of its charter. *Ib.*

RECEIVER.

The probate courts in this state have no power to appoint a receiver in any case. *Searles* v. *Scott*, 246.

RECORD.

1. Where the bill of exceptions taken by the plaintiffs to an order of the court setting aside the service of the writ after pleas were filed, and rendering a final judgment for the defendant, recites that the order thus excepted to was made on the motion of the *plaintiff*, while the judgment of the court itself, states that it was made on the motion of the *defendant*, the high court of errors and appeals will adopt the construction that the order was made on the motion of the defendant, as the most sensible and consistent with the whole record. *Wooten* v. *Wingate*, 271.

2. Where the record is itself contradictory in its parts, that construction must, if practicable, be adopted which will make it sensible and consistent, not one which is wholly absurd and will preclude relief. *Ib.*

3. Every motion made in a cause, constitutes part of its history, and is as much a part of the record as the declaration, plea, or judgment.
Puckett v. *Graves*, 384.

REAL ESTATE.

1. A sheriff who has sold real estate by virtue of his office, is not bound to make a deed to the purchaser, until all the purchase-money is paid.
Davis v. *Pryor*, 114.

2. A sale by order of the probate court of the real estate of a decedent, must be made in strict compliance with the law, by issuing citation and advertising, or it will be void, and the records of the proceedings may be offered to show that the rules of law in those respects have not been strictly observed.
Laughman v. *Thompson*, 259.

Digitized by Google

3. It must appear, from the records of the probate court, in cases of the sale of lands by an administrator under its order, that legal notice has been given to the heirs at law, or a legal reason in excuse of the want of such notice, or both the order and the sale are void. *Ib.*

4. In the absence of the record of the proceedings of the probate court touching the sale of a decedent's realty, the action of that court will be presumed to have been correct; when the record, however, is produced, it must show affirmatively that everything necessary to give the court jurisdiction was performed. *Ib.*

5. A vendor of land who takes no separate or other security for the purchase-money, retains a lien upon the land for its payment; and none but *bona fide* purchasers, without notice, can set up an implied waiver of this equitable mortgage. *Upshur* v. *Hargrove*, 286.

6. To constitute a *bona fide* purchaser, without notice, the party must have advanced a new consideration; or have relinquished some security for a pre-existing debt. *Ib.*

7. U. purchased a tract of land of H.; and agreed to pay for it with other lands if title could be had to them, if not with a stipulated sum; upon which H. conveyed the land to U.'s wife; the title to the other lands not being made, H. filed his bill against U. and wife to subject the land sold by him, to the payment of the stipulated sum, the purchase-money thereof: *Held*, that the land was subject to the vendor's lien. *Ib.*

8. Where a party executes his notes, payable at fixed periods, for the purchase of a tract of land, and receives from the vendor a bond to make title to the land; and the vendor sue on the notes to recover the purchase-money, the contracts are independent, and the vendor may recover, although he has not made a deed to the land. *Hazlip* v. *Noland*, 294.

9. Where a vendor of land in his bond for title, describes the land as lying on a certain creek in the county, in certain sections, without giving the particular subdivisions of the sections, or the township and range in which the land lies; the description of the land will be sufficient to uphold the consideration of the notes given for the purchase-money; as the location on the particular creek removes the uncertainty as to the subdivisions and township. *Ib.*

10. Where a vendor of land has given a bond for title, without affixing any time in which it is to be made, and takes notes, payable at a fixed time, for the purchase-money; and afterward, but before the notes are paid, executes a defective deed to the vendee, he will not thereby be deprived of his right to recover on the notes; as the execution of the defective deed does not absolve him from the obligation of his bond to make a good title, which the vendee may still demand. *Ib.*

11. Whether, where a vendee of land who has a bond for title from the vendor, dies before paying the purchase-money, and his administrators are sued therefor, the administrators can object to a deed from the vendor, made, but

Digitized by Google

not delivered before the vendee's death, for insufficiency, or imperfection, so as to call in question the validity of the title to the land, by way of assailing the validity of the notes? *Quære? Ib.*

12. Whether, where a vendor who has given a bond for title recites in his deed conferring title that he grants, bargains, and sells the land, and in the conclusion of the deed warrants the title only against himself and heirs, he thereby limits the statutory warranty, given to the words, grant, bargain, and sell? *Quære? Ib.*

13. A warranty does not pass title, but only secures an indemnity if there be incumbrances. A vendor of land who has given a bond to make title, it seems, therefore, may, under some circumstances, comply with his bond by giving a deed to the land, with special warranty. *Ib.*

14. In an application for dower the widow must establish the seizin of her husband, either actual or constructive, at some period during the coverture, before her dower can be allotted to her. *Ware* v. *Washington*, 737.

15. A widow is not entitled to dower in lands which her husband held only by virtue of a lease for ninety-nine years; such lease vested but a chattel interest in the husband, out of which the widow is not dowable. *Ib.*

RELEASE.

1. W. P. contracted with the Mississippi and Alabama Railroad Company to build a railroad, furnish materials, an engine, &c., for which the company were to pay him a stipulated sum, a portion of which was to be advanced to enable him to purchase slaves to work on the road; and he was to execute to the company a mortgage on the slaves so purchased, as a security for the diligent and faithful performance of his duties on the road. They advanced the money, and he purchased the slaves and executed the mortgage. The company afterwards, to wit, on the 21st day of December, 1839, and before the road was completed, adopted several resolutions, by the first of which they released W. P. from his obligation to furnish an engine; by the second they directed his mortgage to be cancelled; and by the third, after admitting in a preamble that they had failed to supply him with par funds, they requested that he should proceed to finish the road at his own expense, and retain it until he should be repaid by the profits. They subsequently agreed that F. H. P. should be substituted as a contractor in the place of W. P., and that they would give him $15,000 to complete the road; W. P. at the same time gave to the company his verbal promise, that F. H. P. should finish the road. F. H. P. then, with the knowledge of the company, proceeded to work on the road, and continued to work on it for some time, though he never finished it. *Held*, that the resolutions, by substituting new terms and conditions inconsistent with the original agreement, amounted to an abandonment of the contract with W. P., and when taken in connection with the other circumstances and facts of the case, must be considered as a settlement of the balances

Digitized by Google

between W. P. and themselves; and as a legal consequence, to a discharge of him from all obligations or liability to them, on account of his contract or mortgage. *Petrie* v. *Wright*, 647.

2. A voluntary release of securities held by a corporation, is void as to creditors; yet if, in the settlement of mutual and conflicting claims, a corporation allow a debtor more than he is strictly entitled to, that is not of itself a fraud; there must be some device to injure others, or the act must be so grossly extravagant and wasteful, as to amount to a fraud in law. *Ib.*

REMITTITUR.

Where, in an action upon an open account for attorney's fees, the jury render a verdict for the plaintiff; and at the trial the defendant offered a deposition, proving part payment of the account sued on, which was rejected improperly by the court below: *Held*, that the judgment below should be reversed; but upon the plaintiff's below entering a *remittitur* in this court of the amount proved by the deposition to have been paid, with interest up to the rendition of the verdict below, this court will render a judgment for the balance. *Anderson* v. *Tarpley*, 507.

REPEAL OF STATUTE.

1. Where, in a subsequent statute, there is no express repeal of a former one, the former statute will not be considered repealed by implication, unless the repugnancy between the new provision and the former one be plain and unavoidable. *The Planters Bank* v. *The State*, 628.

2. In the construction of statutes, the intention of the legislature is the cardinal rule of construction. *Ib.*

3. In 1843, the legislature passed a general law prescribing the mode of proceeding against banks that had violated their corporate franchises, (Acts of 1843, 52–57.) In the same year proceedings in the circuit court were commenced under that act against the Planters Bank. In 1844, the legislature passed another act in relation specially to the Planters Bank and one other bank, authorizing them, upon certain conditions, to surrender their charters; and upon their refusal to do so, making it the duty of the attorney-general and requiring him to proceed by bill in the superior court of chancery against them, have a receiver appointed to take charge of their property and proceed to have them wound up; the law of 1844 provided that if either of the companies should accept and comply with the conditions of the act by a voluntary surrender of its charter, then such bank should be released from the operations of the said law of 1843; the Planters Bank did not accept the conditions of the act of 1844, and the proceedings already instituted in 1843, under the law of that year having progressed to judgment in the circuit court against the bank, that court declaring its charter forfeited, and appointing trustees under the law of 1843 to collect its

Digitized by Google

debts and take charge of its property, the bank appealed to this court, and the cause was here submitted on a preliminary motion as to whether the law of 1844 had not repealed the act of 1843, and taken away the jurisdiction of the circuit court. *Held*, that there was no necessary repugnancy between the two acts, and therefore the latter did not by implication repeal the former; that no proceedings being instituted in the chancery court under the latter act, the circuit court did right to proceed to judgment under the law of 1843. *Ib.*

REPLEVIN.

1. In an action of replevin under the statute of 1842, a judgment in favor of the plaintiff for so much money is erroneous; it should be in the alternative, for the property, if to be had, if not, then for its value.

Anderson v. *Tyson*, 244.

2. The judgment in replevin if in favor of the plaintiff, where the defendant has elected to give bond and retain possession of the property, should be entered against both principal and surety in such bond. *Ib.*

3. H. executed a deed of trust on certain slaves and other property to F. as trustee, to secure E. in the payment of certain notes due him by H. After the execution of the notes and deed of trust, H. and E. had an agreement, by which they arranged the terms of the settlement of the debt and deed of trust; part of those terms were, that H. by a day named, was to deliver up to E. the slaves named in the deed of trust; at the end of this agreement was this clause: "Whenever the above stipulations of compromise are complied with, it is to be a full settlement of all debts and demands of either party against the other, and a full release either at law or in equity." H. having failed to deliver up the negroes as stipulated, F., the trustee, brought an action of replevin against J. H., who had one of them in possession, for the slave; the court below instructed the jury on the trial of the replevin, that the agreement of compromise changed the title to the slaves out of F. the trustee, and vested it in E., who alone could recover: *Held*, that the instruction was erroneous; that no part of the agreement went into effect until H. had performed his condition precedent of delivering the slaves to E. *Fultz* v. *House*, 404.

RESCISSION OF SALE AND CONTRACT.

1. A purchaser cannot, by his own act alone, return and revest the property in the seller, and recover the price paid, on the ground of a total failure of consideration, nor can he by the same means protect himself from the payment of the price on the same ground. *Harmon* v. *Sanderson*, 41.

2 In an action for the price of a chattel, proof that the representations of the seller at the time of the sale were fraudulent, and the article of no value, will alone warrant a verdict for the defendant, however far the evidence may extend in mitigation of damages. *Ib.*

Digitized by Google

3. M. W. entered a tract of land, and in January, 1837, assigned the certificate of entry to D. In October, 1838, a judgment was rendered against M. W., under which the land was sold, and bought by H. in September, 1840, who sold by deed of warranty to W. in December, 1840, W. having in 1839 bought the same land from D. to whom a patent issued for it in December, 1841, and who conveyed it by deed to W. in 1844; W. filed a bill against H., alleging that H. misrepresented the nature of his title at the time of sale, and that he, W., had been evicted under a paramount title, and prayed a rescission of the contract of sale from H. to W. H. denied the misrepresentation, and there was no proof of eviction: *Held*, that the sale could not be rescinded, as the complainant had not made out a case of fraud, or of plain and palpable mistake affecting the substance of the subject-matter of the contract; and that the bill must be dismissed without prejudice to W.'s remedies at law. *Wilty* v. *Hightower*, 345.

RETURN ON PROCESS.

1. By the law regulating the territory of Mississippi before it was made a state, chancery jurisdiction was conferred on the supreme court; which was a court of general jurisdiction, and the sheriff its officer, who was bound by law to execute its process. Where, therefore, a bill was filed in that court against adults and infants, to foreclose a mortgage, and the process which was directed to the defendants, commanding them to appear and answer, was returned "*served*" by the sheriff, and a decree rendered thereon; *held*, that the process and return were sufficient to uphold the decree.

Smith v. *Bradley*, 179.

2. Where there has been a defective return upon process, it is a question of error or not in the rendering of the decree, and that decree cannot, on account of such defective return, be attacked collaterally in an action of ejectment against parties claiming under the decree. *Ib.*

REVIVOR.

1. Where the demurrer to a bill is overruled, and the defendant allowed ninety days in which to answer, and the complainant die before the next term of the court, and the bill is revived at that term in favor of the administrator of the complainant; and on the same day of the revival, the defendant having failed to answer, the bill is taken for confessed against him, and a decree entered accordingly, it will be error; the defendant should have been allowed some day for the purpose of answering the bill of revivor.

Upshur v. *Hargrove*, 286.

2. Where a judgment of forfeiture has been rendered against a bank in proceedings under the act of 1843, and trustees have been appointed by the court rendering the judgment, all suits pending in the name of the bank, whether at law or in equity, may be revived at the instance, and in the name of the trustees; and the action will progress in the name of the trus-

Digitized by Google

tees, in the same manner and to the same effect that a suit is revived in the name of an executor or administrator, which was pending in the lifetime of the testator or intestate. *Nevitt* v. *The Bank of Port Gibson*, 513.

SALE OF PERSONAL PROPERTY.

1. It is a general rule, that in an action for the price of a chattel, the vendee may prove, in defence, deceit on the part of the vendor, and that the article was of no value; or he may show a partial unsoundness, in mitigation of damages. *Harmon* v. *Sanderson*, 41.

2. A purchaser cannot, by his own act alone, return and revest the property in the seller, and recover the price paid, on the ground of a total failure of consideration, nor can he by the same means protect himself from the payment of the price on the same ground. *Ib.*

3. In an action for the price of a chattel, proof that the representations of the seller, at the time of the sale, were fraudulent, and the article of no value, will alone warrant a verdict for the defendant, however far the evidence may extend, in mitigation of damages. *Ib.*

4. Whether the sale of a slave under a deed of trust by which the slave was conveyed to a trustee to secure a debt due the *cestui que trust*, will be valid if made by the trustee while the slave is in the adverse possession of another, and not present at the sale. *Quære?* *Hundley* v. *Buckner*, 70.

5. Where personal property is sold not upon a credit, the purchaser cannot take the property, or sue for it without payment or tender of the purchase-money. *Ib.*

SCIRE FACIAS.

1. Where a party defendant who has pleaded to the action, dies during the progress of the suit, and his administrators are brought in by *scire facias*, the plea filed during the lifetime of the intestate, will be the plea of the administrators, if they omit to file a plea to the *scire facias*.

Woodhouse v. *Lee*, 161.

2. If an executor, against whom, as such, various judgments have been obtained, use the assets of the estate of his testator in the payment of the junior judgments against him as such executor, leaving the oldest judgment unpaid, he will be guilty of a *devastavit*, and will be liable to a proceeding against him by *scire facias*, as such executor, to subject him to the payment *de bonis propriis* of the judgment recovered against him as executor, and thus left unpaid. *Black* v. *Barton*, 239.

3. In such case the *scire facias* should state what amount of assets had come to the hands of the executor, as he would not be liable beyond that sum.

Ib.

4. The executor may plead to such *scire facias*, notwithstanding the former judgment against him *plene administravit*; and will be discharged if he can

Digitized by Google

show a full and proper administration of the estate; such plea will not however be supported if there has been a misapplication of assets. *Ib.*

SHERIFF AND SHERIFF'S SALE.

1. A sheriff who has sold real estate by virtue of his office, is not bound to make a deed to the purchaser until all the purchase-money is paid.
Davis v. *Pryor*, 114.
2. Executions in favor of the various officers of the circuit court of Tippah county, amounting to about $130, having been issued for costs against the Mississippi Union Bank, and having come to the hands of the sheriff of that county, were levied on real estate of the bank; the sheriff sold the same for the sum of one thousand dollars to D., who offered the sheriff the amount due the officers of court in specie, and tendered him the residue of his bid in notes of the bank, and demanded a deed to the property. *Held* that the sheriff had a right to demand gold and silver for the whole amount of the bid, and that D. was therefore not entitled to a deed from him.
Ib.
3. Whether a *mandamus* is the appropriate remedy to compel a sheriff to make a deed to property which he has sold as sheriff. *Quære? Ib.*
4. In action against the sheriff by the publisher of a newspaper to recover of him the cost of his advertisements of sheriff's sales; the advertisement of such sales, though signed by the deputy sheriff, will be evidence against the sheriff. *Terral* v. *McRae*, 136.
5. Where an execution on a younger judgment was levied in December, 1840, on personal property which was advertised for sale on the 4th day of January 1841, under that levy; and on the day of sale an execution on an older judgment was levied on the property under sale by virtue of the first levy; the judgment first levied, and under which the sale takes place though junior in date will be entitled to the proceeds of the sale; but the purchaser of the property will hold it subject to the lien of the older judgment.
Calmes v. *Ford*, 190.
6. Possession is notice to the purchaser at execution sale of the title of the party in possession, though he have no deed to the property or other title of record. *Wilty* v. *Hightower*, 345.

SLAVES.

1. L. died in 1836 in this state, and by his will directed his slaves *to be set free and sent to Indiana or Liberia as they might prefer;* he directed also the sale of his property, and part of the proceeds to be paid to the slaves thus liberated: *Held*, that the will was valid, and the executor could proceed in its execution; and that the bequest of property to the slaves was not void for want of capacity in them to take; if they do not comply with the terms of the will the bequest is void; if they do, it is valid. *Leech* v. *Cooley*, 93.
2 Where a slave has been prosecuted before a justice of the peace for lar-

Digitized by Google

ceny, under the statute, (H. & H. 164, § 40,) and the justice has adjudged the costs of the prosecution against the owner of the slave, the circuit court has jurisdiction of a *certiorari*, at the instance of the owner to determine whether, so far as the judgment for costs extended, the decision of the justice had been according to law and facts. *Atchison* v. *Potter*, 120.

3. The statute which subjects the master, employer, or overseer of a slave convicted of larceny, to the costs of prosecution, designed to render the person who had the slave in charge at the time of the commission of the offence, liable for the costs, whether he were master, employer or overseer; it would seem therefore, that a judgment for costs in such case against a master who had not the slave in his employ at the time of the offence would be erroneous. *Ib.*

4. No action can be sustained by the vendee against the vendor of negroes introduced into this state as merchandise, since May, 1833, for a breach of the vendor's warranty of the soundness of such negroes; the contract of sale and the warranty of soundness being void. *Collins* v. *McCargo*, 128.

5. M. introduced negroes into his state as merchandise, since May, 1833, and sold them to C., who gave a bill of exchange in payment; which not being paid, a compromise was made, by which C. lifted the bill, and gave his note instead; afterwards another compromise was made, by which C. was to give up to M. the negroes then living, and execute a bond with surety for a fixed sum, which compromise was carried out: *Held*, in an action on the bond thus given by C. and his surety, that these renewals and compromises did not change the character of the contract between the parties; all the subsequent contracts and agreements depending on the original illegal consideration, were void, and no recovery could be had on the bond. *Ib.*

STATUTE.

1. Where a defence is based upon the provisions of a statute of another state, the statute, in order to make the defence available, must be produced and proved. *Hemphill* v. *Bank of Alabama*, 44.

2. Where in a subsequent statute there is no express repeal of a former one, the former statute will not be considered repealed by implication, unless the repugnancy between the new provision and the former one be plain and unavoidable. *The Planters Bank* v. *The State*, 628.

3. In the construction of statutes, the intention of the legislature is the cardinal rule of construction. *Ib.*

4. In 1843, the legislature passed a general law prescribing the mode of proceeding against banks that had violated their corporate franchises, (acts of 1843, 52—57.) In the same year proceedings in the circuit court were commenced under that act against the Planters Bank. In 1844, the legislature passed another act in relation specially to the Planters Bank, and one other bank, authorizing them upon certain conditions to surrender

Digitized by Google

their charters; and upon their refusal to do so, making it the duty of the attorney-general, and requiring him to proceed by bill in the superior court of chancery against them, have a receiver appointed to take charge of their property, and proceed to have them wound up; the law of 1844 provided that if either of the companies should accept and comply with the conditions of the act by a voluntary surrender of its charter; then such bank should be released from the operations of the said law of 1843; the Planters Bank did not accept the conditions of the act of 1844, and the proceedings already instituted in 1843, under the law of that year, having progressed to judgment in the circuit court against the bank, that court declaring its charter forforfeited and appointing trustees under the law of 1843 to collect its debts and take charge of its property, the bank appealed to this court and the cause was here submitted on a preliminary motion as to whether the law of 1844 had not repealed the act of 1843, and taken away the jurisdiction of the circuit court: *Held*, that there was no necessary repugnancy between the two acts, and therefore the latter did not by implication repeal the former; that no proceedings being instituted in the chancery court under the latter act, the circuit court did right to proceed to judgment under the law of 1843. *Ib.*

SURETY.

1. A mere voluntary engagement to indulge the principal debtor will not discharge the surety. *Payne* v. *The Commercial Bank of Natchez*, 24.
2. There must be a positive and binding agreement between the creditor and principal debtor, based upon some new and valuable consideration, sufficient to tie up the creditor and prevent him from asserting any remedy, during the time for which the indulgence has been given, against the principal, in order to effect a release of the surety. *Ib.*
3. L. being indebted to the Commercial Bank on various notes upon which he was liable, either as indorser or maker, and on which other persons were sureties for him, to reduce his liabilities to a single amount proposed to the cashier of the bank to execute his individual note for the sum total due the bank, and confess a judgment in Louisiana on the note thus made, which judgment should bind all his property, and be in discharge of the notes on which he was liable; the cashier, on consultation with several of the directors, agreed to the arrangement, to be consummated when L. had at his own expense carried the arrangement into effect, and exhibited to the bank satisfactory evidence of it. L. after this agreement and before he confessed the judgment, sold all of his property in Louisiana, which the judgment was to bind, to B., and then executed his note for the sum due the bank, and confessed the judgment as agreed upon. *Held*, that the agreement of the bank being purely conditional, and that condition not being complied with by L., the bank might disregard the arrangement with L. and sue upon the original notes against all the parties to them. *Ib.*

Digitized by Google

4. A creditor who takes collateral security for his debt, is bound to hold it impartially and justly; and if it be lost by his negligence or improper conduct, the surety on such debt may bar the creditor of so much of his demand as he might have received from such collateral. *Ib.*

5. The sureties on a tax-collector's bond are not liable to the publishers of a newspaper, for the payment of the costs of advertising the sales of property by the tax-collector for taxes in such paper; notwithstanding the law makes it his duty to advertise his sales in a newspaper.

Brown v. *Phipps*, 51.

6. Tax-collector's bonds, the conditions of which are to collect and pay into the county and state treasury all the state and county taxes, and to do and perform all the other duties which pertain to their office, are not securities for any services rendered to the state by individuals; but for the state and county only. *Ib.*

7. In an action against the indorser of a bill of exchange, it was proved that the holder of the bill, after its maturity, received ten per cent. of its amount from the acceptor, and in consideration thereof agreed to wait until the drawer of the bill could be heard from, though the witness who testified to the agreement did not recollect that any definite time of payment of the balance due on the bill had been agreed on: *Held*, that the indulgence granted to the acceptor until the drawer could be heard from, based upon a sufficient consideration, exonerated the indorser. *Rupert* v. *Grant*, 433.

8. The sureties of an administrator upon his official bond cannot be sued in equity by a judgment creditor for a *devastavit* committed by the administrator; the remedy of the creditor is by action at law upon the bond.

Buckingham v. *Owen*, 502.

SURPRISE.

Where a deposition has been excluded from the jury, on the ground that the commission under which it was taken was irregular, in not having the name of the commissioner in it when it issued, the party who took the deposition cannot obtain a new trial on the ground of surprise in the exclusion of the deposition, as that exclusion was owing to his own laches in irregularly suing out the commission. *Rupert* v. *Grant*, 433.

SUSPENSION OF SPECIE PAYMENTS.

1. A refusal by a bank, on proper application, to pay its notes, bills, bonds and other liabilities issued by the bank, in specie, is a cause of forfeiture of the charter of such bank. *Commercial Bank of Natchez* v. *The State*, 599.

2. The charter of a bank contained no provision which in so many words required the bank at all times to pay specie; by its charter the capital stock was to be paid in gold or silver, or the notes of specie-paying banks; and the bank was prohibited from issuing notes to a greater amount than three times the amount of the capital stock paid in; by another section of the

Digitized by Google

charter it was provided that if the bank refused to pay its notes on demand, the holder might demand an interest of twelve and a half per cent. per annum on such notes, the payment of which had been refused. In a proceeding by *quo warranto* against the bank, it was alleged as cause of forfeiture, that the bank on the first day of November, 1841, and on divers other days before and since, did refuse, on demand being made at its counter in its banking house during the regular hours for doing business, to redeem in specie or other lawful money of the United States, the notes, bills, bonds, and other liabilities issued by said bank, and then due: *Held*, on demurrer, that the cause of forfeiture was sufficiently pleaded, and the demurrer must be overruled. *Ib.*

3. In a proceeding against a bank for forfeiture of charter, alleging as cause of forfeiture, a suspension of specie payments, the answer of the bank that it paid all its notes and liabilities except certain checks which it had drawn on another bank, for payment of which provision had been made with that bank, but it failed to pay them, and they were returned, and on being returned, the bank which issued them was unable to take them up at the time, but in two years afterwards, and before the commencement of any proceedings against it, it resumed specie payment on those checks and all other liabilities, whenever payment was demanded at its counter, and was then paying specie, was *held*, not to be a sufficient answer to the charge of forfeiture and no excuse for the suspension. *Ib.*
4. How far a mere temporary suspension of specie payments will work a forfeiture of charter and what is a *temporary* suspension? *Quære? Ib.*
5. In the year 1840, a bank chartered previously, being in a state of suspension of specie payments, the legislature passed a law that all the banks in the state, by the 1st of April, 1840, should pay their fives in specie; by the 1st of July, their tens; by the 1st of October, their twentys, and by the 1st of January, 1841, their other notes and debts: *Held*, that this act was constitutional and valid; and a failure on the part of the bank to comply with the provisions of the law would work a forfeiture of its charter. *Ib.*

TAX COLLECTOR.

1. The sureties on a tax collector's bond are not liable to the publishers of a newspaper, for the payment of the costs of advertising the sales of property by the tax collector for taxes in such paper; notwithstanding the law makes it his duty to advertise his sales in a newspaper. *Brown* v. *Phipps*, 51.
2. Tax collector's bonds, the conditions of which are to collect and pay into the county and state treasury all the state and county taxes, and to do and perform all the other duties which pertain to their office, are not securities for any services rendered to the state by individuals; but for the state and county only. *Ib.*

TENDER.

1. L., being sued on a bond due in May, 1840, which was payable in the

Digitized by Google

notes of a particular bank, plead that on the 19th day of November, 1840, he tendered the amount in bills of the bank to the plaintiff, and that he brought the sum due, with interest, in the notes of the bank into court ready to be paid to the plaintiff: *Held*, on demurrer that the plea was bad. *Lanier* v. *Trigg*, 641.

2. A plea of tender must aver a continual state of readiness to pay the sum due, since the tender; for although the defendant may not be able to show the truth of the averment, yet its introduction enables the plaintiff to show if the fact be so that upon a subsequent demand the defendant had failed to pay, which would defeat the defence. *Ib.*

TITLE.

1. Where personal property is sold not upon a credit, the purchaser cannot take the property or sue for it, without payment or tender of the purchase-money. *Hundley* v. *Buckner*, 70.
2. Where a vendee, who has taken from his vendor a bond for title when the purchase-money is paid, has, on the payment of all the purchase-money, such an interest in the premises purchased, as is liable to seizure and sale under execution of *fieri facias* at law. *Moody* v. *Farr*, 100.
3. Where a purchaser, under execution at law, of real estate, to which the judgment debtor had but a bond for title, files his bill against the vendor, averring that the whole purchase-money was paid by the judgment debtor before the sale under execution, and demanding title; and the vendor answer, denying the payment by the vendee, and averring the cancelment of the sale, and delivery up of the title bond, before the sale under execution: *Held*, that the purchaser, at the sheriff's sale, must prove satisfactorily that the whole purchase-money has been paid, or his bill will be dismissed. *Ib.*
4. Where a bond was payable on its face to B., it seems it is a matter of doubt whether it would be admissible in a court of law to prove that the obligation did not originally belong to B., but to a bank. *Lanier* v. *Trigg*, 641.
5. Where a holder sues on a note and his title is properly questioned, he must make out his title; but when the holder is sued for a note payable to bearer, his possession will be a sufficient protection, until a better title is shown. *Smith* v. *Prestige*, 478.

TRUSTEE.

1. Where a trustee, to whom a slave has been conveyed as security for a debt, institutes an action of detinue against a person not a party to the deed, for the recovery of such slave, the recital in the deed of trust and the production of the note to secure which the negro was conveyed, will be *prima facie* evidence, of the *bona fides* of the debt thus secured. *Hundley* v. *Buckner*, 70.

Digitized by Google

2. M. conveyed a slave to B. in trust to secure M. R. & Co. a debt; after the execution of this deed of trust, the slave conveyed by it was purchased under an execution against M. by H. on a jndgment junior to the deed of trust. B., the trustee, sold the slave while in the possession of H., and in the absence of the slave, under the deed of trust to L. R. M.; and thereupon B. instituted an action of detinue for the use of L. R. M. against H. to recover the slave: *Held*, that the action of detinue could not be maintained in the name of one for the use of another, and that therefore the name of the usee in the record was wholly superfluous, an impertinent allegation and should be disregarded. *Ib.*

3. H. executed a deed of trust on certain slaves and other property to F. as trustee to secure E. in the payment of certain notes due him by H. After the execution of the notes and deed of trust, H. and E. had an agreement by which they arranged the terms of the settlement of the debt and deed of trust; part of those terms were that H., by a day named, was to deliver up to E. the slaves named in the deed of trust; at the end of this agreement was this clause: "Whenever the above stipulations of compromise are complied with, it is to be a full settlement of all debts and demands of either party against the other, and a full release either at law or in equity." H. having failed to deliver up the negroes as stipulated, F., the trustee, brought an action of replevin against J. H., who had one of them in possession, for the slave; the court below instructed the jury on the trial of the replevin, that the agreement of compromise changed the title to the slaves out of F. the trustee, and vested it in E. who alone could recover. *Held*, that the instruction was erroneous; that no part of the agreement went into effect until H. had performed his condition precedent, of delivering the slaves to E. *Fultz* v. *House*, 404.

4. When a judgment of forfeiture has been rendered against a bank in proceedings under the act of 1843, and trustees have been appointed by the court rendering the judgment, all suits pending in the name of the bank whether at law or in equity, may be revived at the instance and in the name of the trustees; and the action will progress in the name of the trustees, in the same manner and to the same effect that a suit is revived in the name of an executor or administrator, which was pending in the lifetime of the testator or intestate. *Nevitt* v. *The Bank of Port Gibson*, 513.

5. The act of 1843, in its ninth, tenth and eleventh sections, directing the trustees to proceed to collect the debts and property of the bank for the benefit of creditors, to be applied as thereafter directed by law, constitutes the property of the bank a trust fund for the benefit of creditors, which no subsequent legislation can appropriate otherwise; and if the legislature fail to direct the mode of distribution among the creditors, a court of chancery will execute the trust. *Ib*

6. A judgment of forfeiture against a bank, and appointment of trustees under the act of 1843, is an assignment by operation of law, of all the prop-

Digitized by Google

erty of the bank to the trustees, for the benefit of creditors; which relates back to the period of the issuance of the injunction against the bank under the act, and preserves the assets and property of the bank from that time, for the benefit of the creditors. *Ib.*

7. A judgment of forfeiture against a bank under the act of 1843, has none of the common law consequences of a judgment of forfeiture; the legislature having waived its right to the common law penalties, by providing that concurrently with the judgment of forfeiture, the assets and property of the bank shall vest in trustees for the benefit of creditors of the bank. *Ib.*

VENDOR'S EQUITABLE LIEN.

1. A vendor of land who takes no separate or other security for the purchase-money, retains a lien upon the land for its payment; and none but *bona fide* purchasers, without notice, can set up an implied waiver of this equitable mortgage. *Upshur* v. *Hargrove*, 286.
2. To constitute a *bona fide* purchaser without notice, the party must have advanced a new consideration, or have relinquished some security for a pre existing debt. *Ib.*
3. U. purchased a tract of land of H., and agreed to pay for it with other lands if title could be had to them; if not, with a stipulated sum; upon which, H. conveyed the land to U.'s wife. The title to the other lands not being made, H. filed his bill against U. and wife, to subject the land sold by him, to the payment of the stipulated sum, the purchase-money thereof; *Held*, that the land was subject to the vendor's lien. *Ib.*

VENDOR AND VENDEE.

1. Where a vendee who has taken from his vendor a bond for title when the purchase-money is paid, has, on the payment of all the purchase-money, such an interest in the premises purchased, as is liable to seizure and sale under execution of *fieri facias* at law. *Moody* v. *Farr*, 100.
2. Where a purchaser under execution at law of real estate to which the judgment debtor had but a bond for title, files his bill against the vendor, averring that the whole purchase-money was paid by the judgment debtor before the sale under execution, and demanding title; and the vendor answer, denying the payment by the vendee, and averring the cancelment of the sale, and delivery up of the title bond, before the sale under execution: *Held*, that the purchaser at the sheriff's sale must prove satisfactorily that the whole purchase-money has been paid, or his bill will be dismissed. *Ib.*
3. A vendor of land who takes no separate or other security for the purchase-money, retains a lien upon the land for its payment, and none but *bona fide* purchasers, without notice, can set up an implied waiver of this equitable mortgage. *Upshur* v. *Hargrove*, 286.
4. To constitute a *bona fide* purchaser without notice, the party must have advanced a new consideration, or have relinquished some security for a pre-existing debt. *Ib.*

Digitized by Google

5. U. purchased a tract of land of H., and agreed to pay for it with other lands if title could be had to them; if not, with a stipulated sum, upon which H. conveyed the land to U.'s wife. The title to the other lands not being made, H. filed his bill against U. and wife, to subject the land sold by him, to the payment of the stipulated sum, the purchase-money thereof: *Held*, that the land was subject to the vendor's lien. *Ib.*

6. Where a party executes his notes, payable at fixed periods, for the purchase of a tract of land, and receives from the vendor a bond to make title to the land; and the vendor sue on the notes to recover the purchase-money, the contracts are independent, and the vendor may recover, although he has not made a deed to the land. *Hazlip* v. *Noland*, 294.

7. Where a vendor of land, in his bond for title, describes the land as lying on a certain creek in the county, in certain sections, without giving the particular subdivisions of the sections, or the township and range in which the land lies; the description of the land will be sufficient to uphold the consideration of the notes given for the purchase-money; as the location on the particular creek removes the uncertainty as to the subdivisions and township. *Ib.*

8. Where a vendor of land has given a bond for title, without affixing any time in which it is to be made, and takes notes, payable at a fixed time, for the purchase-money; and afterward, but before the notes are paid, executes a defective deed to the vendee, he will not thereby be deprived of his right to recover on the notes; as the execution of the defective deed does not absolve him from the obligation of his bond to make a good title; which the vendee may still demand. *Ib.*

9. Whether, where a vendee of land who has a bond for title from the vendor, dies before paying the purchase-money, and his administrators are sued therefor, the administrators can object to a deed from the vendor, made but not delivered before the vendee's death, for insufficiency or imperfection, so as to call in question the validity of the title to the land, by way of assailing the validity of the notes? *Quære? Ib.*

10. Whether, where a vendor who has given a bond for title recites in his deed conferring title that he grants, bargains, and sells the land, and in the conclusion of the deed warrants the title only against himself and heirs, he thereby limits the statutory warranty given to the words, grant, bargain, and sell? *Quære? Ib.*

11. A warranty does not pass title, but only secures an indemnity if there be incumbrances. A vendor of land who has given a bond to make title, it seems, therefore, may, under some circumstances, comply with his bond by giving a deed to the land, with special warranty. *Ib.*

12. It is a general rule that if there be a mere failure of consideration arising from the sale of a defective legal title, unmingled with fraud or bad faith, the vendee will be left to the covenants and warranty in his deed.

Wilty v. *Hightower*, 345.

Digitized by Google

VERDICT.

1. Where a jury in the trial of an action for assault and battery, after having retired to make up their verdict, agreed immediately upon entering into the jury room, that each should put down a sum which should be divided by twelve, and that the result should give the amount of damages to be found by their verdict; and this agreement was carried out and acted on; *Held*, that the verdict so found was irregular, and should be set aside.

Parham v. *Harney*, 55.

2. Where an issue has been made up in the probate court and sent to the circuit court for trial before a jury, upon the rendition of the verdict, the issue must be sent back to the probate court for judgment; and if the circuit court undertake to render a judgment upon such verdict, that judgment will be a nullity. *Wallace* v. *Wingate*, 151.

3. Where a circuit court has rendered a judgment upon a verdict on an issue from the probate court, no appeal or writ of error will lie from such judgment, it being a nullity; and if one be prosecuted it will be dismissed. *Ib.*

4. A judgment *non obstante veredicto* cannot be rendered after a judgment upon the verdict has been entered; the rule on that subject is, that the motion for such judgment (*non obstante veredicto*) must be made immediately after the verdict, and before a judgment is rendered on it.

The State v. *The Commercial Bank of Manchester*, 218.

5. In an action of assumpsit, the defendant plead a special plea of set-off, which was the only plea pleaded; the plaintiff took issue upon it, and a verdict was rendered thereon, and judgment given accordingly: *Held*, that the mispleading was cured by the verdict, and that the verdict and judgment should not be disturbed. *Henry* v. *Hoover*, 417.

6. If a claim be placed in the hands of two attorneys practising in partnership, and before any steps are taken in the collection of the claim, the firm dissolve, and one of the members take charge of the claim, and render all the services in its collection, and sue individually the owner of the claim for his fees for so doing, the jury will be justified in inferring that it was part of the contract of dissolution between the partners, that the one who has rendered the services should attend to the claim and receive the compensation, and their verdict to that effect will be upheld.

Anderson v. *Tarpley*, 507.

7. An overseer having been engaged, cannot put another in his place, though equal to himself in capacity, without the consent of his employer.

Hariston v. *Sale*, 634.

8. H. engaged S. as an overseer for a year, at $650; before the year expired S. left without the knowledge or consent of H. though he employed a substitute who, during the absence of S. conducted the business of H. equally as well as S. could have done; S. sued H. for his full wages, and the jury returned a verdict in favor of S. for the whole amount claimed, with interest; H. moved for a new trial, and the court below overruled the motion: *Held*, that the verdict was excessive, and a new trial should have been granted.

Ib.

Digitized by Google

WAIVER.

1. Where the widow of an intestate told his son, in conversation, that she waived her right of administering on her husband's estate, and told him to take out letters, which he did; *held*, that these declarations, not made in court, would not preclude the widow from changing her mind at any time within the period allotted by law, and asserting her right to the grant of administration to herself. *Muirhead* v. *Muirhead*, 451.

2. J. having a claim against the state, the legislature passed a law by which the governor, the auditor, and commissioner of public buildings were authorized to examine J's. accounts, and to make him such allowance as they might find him entitled to: *Held*, that if J. assented to the law by having his accounts examined under it, and they decided against him, he was precluded from making further claim. *Jack* v. *The State*, 494.

3. Where a bill was filed by J. against the state to recover the amount of an alleged indebtedness, to which the state by her officer answered, that the legislature had by law authorized the governor, auditor, and commissioner of public buildings to examine J.'s accounts and make him such allowance as they might find him entitled to; and that they had examined J.'s accounts, and found that there was nothing due him; *held*, that the answer of the state setting up this matter in avoidance of the bill, must be established by strict proof; and the certificate of these officers to the effect set up in the answer, but which did not state that J. submitted to them his accounts for examination or was present when his accounts were exhibited, will not be sufficient evidence to maintain the answer. *Ib.*

WARRANTY.

1. The following words, in a bill of sale of negroes, viz.: "Which negroes I warrant sound and healthy in body and mind, so far as I know or believe," constitute an unlimited warranty of soundness. *Collins* v. *McCargo*, 128.

2. Whether were a vendor who has given a bond for title, recites in his deed conferring title that he grants, bargains and sells the land, and in the conclusion of the deed warrants the title only against himself and heirs, he thereby limits the statutory warranty given to the words *grant*, *bargain* and *sell*? *Quære*? *Ib.*

3. A warranty does not pass title, but only secures an indemnity if there be incumbrances. A vendor of land who has given a bond to make title, it seems therefore may, under some circumstances, comply with his bond by giving a deed to the land with special warranty. *Ib.*

WIDOW.

1. The statute (H. & H. 395,) gives the widow of an intestate the preference of administering upon his estate; nor will that preference be taken away by the fact of her having once administered on the estate, and then renounced her administration; and of her claiming causes of action against the estate, which were denied by the heirs. *Pendleton* v. *Pendleton*, 448.

2. By the statute, the widow is entitled to take out letters of administration on her husband's estate in preference to the son of the deceased.

Muirhead v. *Muirhead*, 451.

Digitized by Google

3. M. died Nov. 28, 1844; and at the December term, 1844, of the probate court, his son applied for, and obtained letters of administration upon his estate; at the January term, 1845, and within sixty days from the death of her husband, the widow of M. applied for letters of administration, and for the removal of the son: *Held*, that the widow's application should be granted. *Ib.*

4. Where the widow of an intestate told his son, in conversation, that she waived her right of administering on her husband's estate, and told him to take out letters, which he did; *held*, that these declarations not made in court, would not preclude the widow from changing her mind at any time within the period allotted by law, and asserting her right to the grant of administration to herself. *Ib.*

5. The widow of an intestate, applying to administer on her deceased husband's estate, read the decree of a court divorcing the deceased from a former wife; this was excepted to by the party contesting her right to the administration: *Held*, that if the admission of the decree were erroneous it would not operate to the benefit or injury of either party, as her husband's right to marry was not questioned and it could not therefore defeat the widow's right. *Ib.*

6. In an application for dower the widow must establish the seizin of her husband either actual or constructive, at some period during the coverture, before her dower can be allotted to her. *Ware* v. *Washington*, 737.

7. A widow is not entitled to dower in lands which her husband held only by virtue of a lease for ninety-nine years; such lease vested but a chattel interest in the husband, out of which the widow is not dowable. *Ib.*

WILL.

L. died in 1836 in this state, and by his will directed his slaves *to be set free and sent to Indiana or Liberia as they might prefer;* he directed also the sale of his property, and part of the proceeds to be paid to the slaves thus liberated: *Held*, that the will was valid, and the executor could proceed *in its* execution; and that the bequest of property to the slaves was not void for want of capacity in them to take; if they do not comply with the terms of the will the bequest is void; if they do it is valid. *Leech* v. *Cooley*, 93.

WRIT OF ERROR.

1. Where a circuit court has rendered a judgment upon a verdict on an issue from the probate court, no appeal or writ of error will lie from such judgment, it being a nullity; and if one be prosecuted it will be dismissed. *Wallace* v. *Wingate*. 151.

2. Although, as a general rule, a writ of error cannot be prosecuted after the forfeiture of a forthcoming bond, yet, if that bond be made the subject of a motion and judgment, a writ of error may be granted to reverse that judgment, because it is a distinct and independent matter. *Puckett* v. *Graves*, 384

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google